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THE CASE OF THE Quo Warranto Againſt the City of LONDON.

WHEREIN

The JUDGMENT in that CASE, and the ARGUMENTS in LAW touching the FORFEITURES and SURRENDERS of CHARTERS, are Reported.

LONDON,
Printed for *George Grafton*, near *Temple-Bar* in *Fleet-ſtreet*, 1690.

THE

CASE

OF THE

Quo Warranto

A

City of [illegible]DON.

The Jur[illegible] CASE, and the Argu[illegible] touching the Forfeit[illegible] of CHAR[illegible]S, are Reported.

LONDON,

Printed for George Grafton, near Temple-Bar in Fleet-street, 1690.

Mich. 33. *Car.* II. *in B. R. rot.* 137.

Sir *Robert Sawyer* Knight, His Majesty's Attorny General

AGAINST

The Lord Mayor, and Commonalty, and Citizens of *London.*

The Information in Nature of a Quo Warranto *sets forth,*

THAT the Mayor and Commonalty and Citizens of the City of *London*, by the space of a Month then last past and more, used and yet do claim to have and use, without any Lawful Warrant or Regal Grant within the City of *London* aforesaid, and the Liberties and Priviledges of the same City, The Liberties and Priviledges following, *(viz.)*

I. To be of themselves a Body Corporate and Politique by the Name of Mayor and Commonalty and Citizens of the City of *London.*

II. To have Sheriffs *Civitat. & Com' London. & Com. Midd'*, and to name, elect, make and constitute them.

III. That the Mayor and Aldermen of the said City should be Justices of the Peace, and hold Sessions of the Peace.

All which Liberties, Priviledges and Franchises the said Mayor and Commonalty and Citizens of *London* upon the King did by the space aforesaid Usurp, and Yet do Usurp.

THE Mayor and Commonalty and Citizens they appear by their Attorney, and Plead, *Plea.*

I. As to their being a Body Politique and Corporate, they prescribe and say,

1. That the City of *London* is, and time out of mind hath been an Antient City, and that the Citizens of that City are, and by all that time have been, a Body Corporate and Politique, by Name of Mayor and Commonalty and Citizens of the City of *London.*

That in *Magna Carta de Libertatib' Angliæ*, in the Parliament holden 9 *Hen.* 3. it was enacted *quod Civitas London' habeat Omnes Libertates ſuas antiquas & Conſuetudines ſuas.*

That in the Parliament 1 *E.* 3. That King by his Charter *De Aſſenſu Prelatorum Comitum Baronum & totius Communitatis Regni ſui*, and by Authority of the ſame Parliament, having recited that the ſame Citizens at the time of the making *Magna Carta*, and alſo in the time of *Edward the Confeſſor*, *William the Conqueror*, and other his Progenitors, had divers Liberties and Cuſtoms, Wills and Grants by Authority aforeſaid, That the ſame Citizens ſhall have their Liberties according to *Magna Carta*--- And that for any Perſonal Treſpaſs *alicujus Miniſtri ejuſdem Civitatis*; *Libertas Civitatis illius in manus ejuſdem Domini Regis* Ed. 3. *vel heredum ſuorum non caperetur, ſed hujuſmodi Miniſter prout, qualitatem transgreſſionis puniretur.*

They Plead alſo,

That in the Parliament holden 7 *R.* 2. *Omnes Conſuetudines Libertates Franchesia & Privilegia Civitatis predict' tunc Civibus Civitatis illius, & eorum Succeſſoribus, Licet uſi non fuerint vel abuſi fuerint Authoritate ejuſdem Parliamenti, ratificat' fuerunt.*

Then they Plead the Confirmations of ſeveral later Kings by their Charters, as of

King *Henry* VI. by his Charter, Dated 26 *Octob.* 23 *H.* 6.
King *Edward* IV. by his Charter, Dated 9 *Nov.* 2 *E.* 4.
King *Henry* VII. by his Charter, Dated 23 *July*, 20 *H.* 7.
King *James* I. by his Charter, Dated 25 *Sept.* 6 *Jac.* 1.
King *Charles* I. by his Charter, Dated 18 *Octob.* 14 *C.* 1.
King *Charles* II. by his Charter, Dated 24 *Jan.* 15 *C.* 2.

Ac eo Warranto they claim to be, and are a Body Politique, &c. and traverſe their Uſurping upon the King.

II. As to the having, electing, making and conſtituting Sheriffs of *London* and *Middleſex*, they Plead,

That

That they are, and time out of mind were a Body Politique and Corporate, as well by the Name of Mayor and Commonalty and Citizens, *quam per nomen Civium London.* And that King *John* by his Letters Patents under the Great Seal of *England* in Court produced, dated 5 *Julii, Anno regni ſui primo,* granted to the Citizens of *London,* that they ſhould have the electing, making and conſtituting Sheriffs of *London* and *Middleſex imperpetuum.*

Then they plead this Liberty and Franchiſe confirmed to them by all the aforementioned Statutes and Charters *ac eo Warranto* they claim to make and conſtitute Sheriffs.

III. As to the Mayors and Aldermens being Juſtices of the Peace, and holding Seſſions, they plead,

That the City is, and time out of mind was, an Antient City and County, and the Citizens a Body Politique.

That King *Charles* the Firſt by his Letters Patents, Dated 18 *Octob.* 14. *Car.* I. Granted to the Mayor and Commonalty and Citizens of the City of *London,* That the Mayor and Aldermen of *London,* ſuch of them as had been Mayors, ſhould be Juſtices of the Peace, and ſhould hold Seſſions, *& eo Warranto,* they claim to be Juſtices, and hold Seſſions.

TO this Plea the Attorney General replies. And as to the Mayor and Commonalty and Citizens of *London,* being a Body Politique and Corporate, *Reſponſ.*

Firſt takes Iſſue that they never were a Body Corporate, and for this puts himſelf upon the Country. And then goes over and pleads,

That the Mayor, Commonalty and Citizens aſſuming upon themſelves to be a Body Politique and Corporate, and by reaſon thereof to have Power and Authority to convocate and aſſemble, and make Laws and Ordinances not contrary to the Laws of the Kingdom, for the better Government of the City and Citizens, and for preſerving the Kings Peace--Under colour and pretext thereof, but reſpecting only their private gain and profit, and againſt the Truſt in a Body Corporate, by the Laws of this Kingdom repoſed, aſſumed an unlawful and unjuſt Authority, to levy Mony upon the

Kings Subjects, to their own proper use, by colour of Laws and Ordinances by them *de facto*, ordained and established. And in prosecution and execution of such illegal and unjust Power and Authority by them Usurp'd 17*th* of *Septemb.* 26 *Car.* II. in their Common Council Assembled, made, constituted and published a certain Law by them *de facto*, enacted for the levying of several Sums of Mony of all the Kings Subjects coming to the Publique Markets within the City to sell their Provisions, (*viz.*) Of every Person for every Horse-load of Provisions into any publick Market within the said City brought to sell, 2 *d. per* day. For every Dosser of Provisions, 6 *d. per* day. For every Cart-load not drawn with more than Three Horses, 4 *d. per* day. If drawn with more than three *Horses*, 6 *d. per* day. And that these Sums of Mony should be paid to the use of the Mayor, Commonalty and Citizens: And if any refused to pay, then to be removed from his Place in the Market. And that by colour of this Law the Mayor, Commonalty and Citizens for their own private Gain, had Illegally by the space of Seven Years next after the making this Ordinance, received divers great Sums of Mony, in all amounting to 5000 *l. per Annum*, in oppression of the Kings Subjects.

And further, That whereas a Session of Parliament was holden by Prorogation, and continued to the 10*th* of *January*, 32 *Car.* II. and then prorogued to the 20th of *January* then next:

The Mayor, Commonalty and Citizens, 13 *Jan.* 32 *Car.* II. in their Common Council assembled unlawfully, maliciously, advisedly and seditiously, and without any lawful Authority, assumed upon themselves *Ad censendum & judicandum dictum Dominum Regem & Prorogationem Parliamenti per Dominum Regem fac fact'*. And then and there in Common Council Assembled, did give their Votes and Order, that a certain Petition under the name of the Mayor, Aldermen and Commons of the City of *London* in Common Council assembled, to the King should be exhibited, in which said Petition was contained,

That by the Prorogation the prosecution of the publique Justice of the Kingdom, and the making necessary provision

for

for the preſervation of the King, and of his Proteſtant Subjects had received interruption. And that the Mayor, and Commonalty and Citizens in the ſame Common Council aſſembled did unlawfully, maliciouſly, adviſedly and ſeditiouſly, and with intention that the ſaid Petition ſhould be diſpers'd amongſt the Kings Subjects, to induce an opinion in them, that the ſaid King by proroguing the Parliament had obſtructed the publique Juſtice, and to incite the Kings Subjects to hatred of the Kings Perſon and Government, and to diſturb the Peace of the Kingdom, did Order that the ſaid Petition ſhould be printed, and the ſame was printed accordingly to the intent and purpoſe aforeſaid.

By which the Mayor, Commonalty and Citizens aforeſaid the Priviledge, Liberty and Franchiſe of being a Body Politique and Corporate did forfeit, and afterwards by the time in the Information, that Liberty and Franchiſe of being a Body Politique, did uſurp upon the King. *Et hoc*, &c.

And as to the other two Pleas, (*viz.*) The making and having Sheriffs and Juſtices of the Peace, The Attorney General Imparles to *Mich.* Term.

THE Mayor, Commonalty and Citizens, as to the *Plea* of the Attorney General, pleaded in Aſſigning a Forfeiture of their being a Body Politique and Corporate, *Rejoynder.*

Proteſtando, That thoſe *Pleas* by the Attorney pleaded, and the matter in the ſame contained, are inſufficient in the Law to forejudge or exclude the Mayor and Commonalty and Citizens from being a Corporation.

Proteſtando etiam, That no Act or Deed, or By-Law made by the Mayor, Aldermen and Common Council is the Act or Deed of the Body Corporate.

Proteſtando etiam, That they the Mayor and Commonalty and Citizens of *London* never took upon them any unlawful or unjuſt Authority to Tax the Kings Subjects for their own private Gain, or did ever levy or exact from the Kings Subjects coming to Markets ſuch yearly Sums as in the Replication are alledged--- For *Plea* ſay,

That

That *London* is the Metropolis of *England*, and very populous, & *Celeberrimum Emporium totius Europæ.*

That there are, and time out of mind have been, divers publique Markets for Proviſion and Merchandiſe within the ſaid City to be ſold.

That the Mayor and Commonalty and Citizens have been, time out of mind, and yet are, ſeiz'd of theſe Markets in Fee, and by all the ſaid time at their own Coſts and Expences have provided and have accuſtomed, and ought to provide at their own coſts Places for the holding the ſaid Markets and Stalls, and Standing, and other Accommodations for perſons bringing Proviſions and Merchandiſes to the ſaid Markets, and Superviſors and other Officers for the better preſerving and ordering the ſaid Markets, and of the great concourſe of perſons coming to the ſame; and for the ſuſtaining and ſupporting of the ſaid coſts and expenſes, by all the time aforeſaid have had, and ought to have, reaſonable Tolls, Rates or Sums of Mony of perſons coming to the ſaid Markets for their Stalls, Standings, and other Accommodations by them for the better expoſing their Commodities had and enjoyed.

They further ſay, That the Citizens and Freemen of *London* are very numerous, (*viz.*) 50000 and more.

That within the ſaid City there hath been, time out of mind, a Common Council aſſembled as often as neceſſary, conſiſting of the Mayor, Aldermen, and of certain of the Citizens, not exceeding 250 perſons thereto annually elected, called the Commons of the ſaid City.

That there is a Cuſtom within the ſaid City for the Mayor, Aldermen and Common Council to make By-laws and Ordinances for the Regulation and Government of the publique Markets within the City.

That theſe Liberties and Cuſtoms of the City were confirmed by *Magna Carta*, and the other Statutes in the Plea abovementioned.

That by reaſon of the burning of the City in *Septemb.* 1666. and the Alterations in the Market-Houſes and Places thereby occaſion'd, for the eſtabliſhing and reſetling the Markets within the City, 17 *Septemb.* 26 *Car.* II the then Mayor

Mayor, Aldermen and Commons in Common Council Aſſembled, according to the ſaid Cuſtom, for the better Regulation of the ſaid Market did make and publiſh an Ordinance, Entituled *An Act for the Settlement and well-ordering the Publique Markets within the City of* London; by which ſaid Ordinance reciting that for the accommodation of the Market People with Stalls, Shelters, and other Neceſſaries for their Standing in the Markets, and for the amendment, paving and cleanſing the Market-places, and for the ſupport and defraying the incident Charges thereof, there have been always certain reaſonable Rates and Duties paid for the ſame. And to the intent that the ſaid Rates may be aſcertain'd and made publique to all Market-people, and the Collectors reſtrained from exacting-- It was Enacted and Ordained by the ſaid Common-Council, that the Rates and Sums in the Replication ſhould be paid to the uſe of the Mayor and Commonalty and Citizens; or upon refuſal, to be removed out of the Market. And they aver, that theſe are all the Rates or Duties paid, and were reaſonable Sums to be paid; and theſe they have demanded and received for the uſe and purpoſe aforeſaid, as was lawful for them to do.

As to the other matter alledged by the Attorney General in Aſſigning the Forfeiture, they ſay,

That within this Kingdom, (*viz.*) at the Pariſh of St. *Michael Baſſiſhaw*, *London*, there was an execrable Plot and Conſpiracy proſecuted by Papiſts to deſtroy the King, and to ſubvert the Ancient Government, and ſuppreſs the true Religion in this Kingdom Eſtabliſhed.

That Sir *Edmundbury Godfrey* took Examinations of Witneſſes, and Informations of the ſame; and alſo of the burning of *London* by the *Papiſts*.

That divers of theſe Conſpirators had lain in wait for him and murthered him, to the intent to ſuppreſs his Examinations, and to deter other Magiſtrates from acting in the Diſcovery.

That *Green* and others were try'd, and hang'd for this Murther.

That

That *Coleman* and others were alſo try'd, and executed for the ſame Conſpiracy.

That *William* Lord *Powis*, Lord *Arundel* of *Warder*, Lord *Petre*, Lord *Bellaſis* were Impeached by the Commons in Parliament of *High Treaſon* for the ſame Conſpiracies, and ſent to the *Tower*.

That the King in his Speech to that Parliament had recommended to them the further purſuit and examination of that Conſpiracy, declaring he thought not himſelf nor them ſafe, till that matter were gone through with; and therefore that it was neceſſary that the ſaid Lords in the *Tower* ſhould be brought to their Trials, that Juſtice might be done; and the Parliament having made an Addreſs to the King, wherein both Lords and Commons declared their being deeply ſenſible of the ſad condition of the Realm, occaſioned chiefly by the Conſpiracies of a Popiſh Party, who had plotted and intended the Deſtruction of the King, and Subverſion of the Government and Religion of the Kingdom; and thereupon a Solemn Faſt kept purſuant to the Kings Proclamation, grounded upon the ſaid Addreſs, and divers Bills prepared to be paſs'd into Laws for preſervation of his Proteſtant Subjects.

Theſe Impeachments and Bills being thus depending, and the Lords in the *Tower*, not Tryed, the Parliament was upon the 10*th* of *January* prorogued, as the Attorney General above in his Replication hath alledged, by reaſon whereof the Citizens and Inhabitants of the ſaid City being faithful Subjects to the King, were much diſquieted with the ſenſe and apprehenſions of the Danger threatning the Perſon of the King, his Government and Realm, by reaſon of the Conſpiracies aforeſaid, as is by both King and Parliament affirmed and declared; and conceiving no better means to prevent, than by the Sitting of the Parliament; and having received a Petition from divers faithful Subjects, Citizens of *London*, to the ſame effect: And it being lawful to Petition, the Mayor, Sir *Patience Ward*, and the Aldermen and Commons in Common Council aſſembled, for the preſervation of the King and his Government did cauſe to be written the Petition in the Replication mentioned, which is ſet forth

in

in *hæc verba*; and did Order, that after the ſame was preſented to the King, it ſhould be Printed for the ſatisfaction of the troubled Minds of the ſaid Citizens; and traverſe the writing or making any other Petition, or making this to any other end or intent than they have pleaded.

THE Attorney General as to the Plea of the Mayor, and Commonalty and Citizens pleaded to the making and publiſhing the Ordinance about the Markets, Surrejoynder.

Proteſtando, That the Mayor and Commonalty and Citizens were not ſeiz'd of the Markets, nor at their charges provided Stalls and Neceſſaries, or Market-places.

Proteſtando etiam, That the ſaid Rates and Sums were not reaſonable.

For Plea ſaith, That by a Statut made 22 *Car.* II. it was enacted that Places for Markets ſhould be ſet out, and 2 *d. per* Chaldron upon Coals for the charge of that, and many other things was given; and that they received a great Sum out of that Duty for the purpoſe aforeſaid; and yet for their own private Lucre took the Mony by the Ordinance.

And traverſeth, that the Mayor and Commonalty and Citizens time out of mind *habuerunt & habere conſueverunt Tolneta Ratas ſive denariorum ſummas per ipſos Majorem Communitatem & Cives ſuperius ſuppoſit. per prefatam Legem, ſive Ordinationem predict' Aſſeſſ. & in certitudinem reduct' prout per placitum ſuum ſuperius rejungendo placitat' ſupponitur.*

And to the Plea of the Mayor and Commonalty and Citizens pleaded to the Reſidue of the Attorney's matter aſſigned for a Forfeiture, as aforeſaid,

The Attorney *Proteſtando*, That the aforeſaid Prorogation of the Parliament was for urgent Cauſes concerning the good of the Kingdom, and thereby the proſecution of publique Juſtice not interrupted.

And Demurrs to the ſaid Plea of the Mayor and Commonalty and Citizens by them pleaded as to the Petition.

Rebutter. THE Mayor and Commonalty and Citizens, as to the making and publiſhing the Ordinance for the payment of Monies by thoſe that come to the ſaid Markets, ſay as before,

That the Mayor and Commonalty and Citizens have, time out of mind, had, and accuſtomed to have, reaſonable Tolls, Rates, or Sums of Mony of all Perſons coming to theſe Markets with Victuals and Proviſions there to be ſold, for Stalls, Standings, and other Accomodations by them had for expoſing their Victuals and Proviſions to ſale. And of this they put themſelves upon the Country, &c. To this Mr. Attorney demurrs.

And as to the Plea by the Mayor and Commonalty and Citizens pleaded to the Reſidue of the matter by the Attorney General, aſſigned for Forfeiture, they joyn in Demurrer.

Memorandum, That when the Demurrer in this Caſe was joyn'd, (*viz.*) *Mich.* Term. 34 *Car.* II. Mr. Sergeant *Pemberton* was Chief Juſtice of the *King-Bench.* But before *Hillary Term*, that it came to be argued, he was removed, and made Chief Juſtice of the *Common-Bench*; and Sir *Edmoud Saunders*, who had been Counſel for the King, in drawing and adviſing the Pleadings, was made Chief Juſtice of the *Kings Bench.*

De

De Termino Sancti Hillarii Annis RRs. Car. II. 34. & 35. Annoq; Dom. 1682.

In Banco Regis die Mercurii 7. Februarii.

Dominus Rex verſus Majorem Communitat' & Cives Civitat' London.

THIS Great Caſe was twice only argued at the Bar: Firſt, by Mr. Finch the Kings Sollicitor, for the King; and Sir George Treby Recorder of London, for the City. And next, by Sir Robert Sawyer the Kings Attorney General, for the King; and Henry Pollexfen for the City.

Mr. Sollicitor. The Queſtions in this Caſe, as I think, will be, Mr. Sollicitor.

I. Whether any Corporation can be Forfeited?

II. Whether the City of *London* differ from other Corporations as to point of Forfeiture?

III. Whether any Act of the Mayor, Aldermen and Common Council in Common Council Aſſembled, be ſo much the Act of the Corporation as can make a Forfeiture?

IV. Whether the Acts by them done in making the By-Law, and receiving Mony by it; or in making the Petition, and cauſing it to be Printed and Publiſhed be ſuch Acts, as if done by the Corporation, will make a Forfeiture of the Corporation?

The Firſt of theſe Queſtions truly I ſhould not make any Queſtion at all, but that this Caſe has been a Caſe of ſo great expectation, every man hath diſcourſed about it, and the preſudice that ſome have entertained concerning it, have drawn them to aſſert the Negative Propoſition. Therefore, my Lord, becauſe this ſtrikes to the whole, though I think it hath no Foundation in Law, I will beg leave to remove this Objection out of the Caſe.

I. Firſt of all, No Corporation hath any other Creation than any other Franchiſes have, and ſubſiſt upon the ſame Terms that other Franchiſes do.

II. There is a Truſt or a Condition in Law, that is annexed to, and grows upon all Franchiſes, that they be not abuſed, and the Breach of them is a Forfeiture of the very being of the Franchiſe.

III. And as there is no Foundation of that Opinion in Law, ſo the Miſchiefs would be great, if the Law were otherwiſe. For,

First, That no Corporation hath any other Creation than other Franchises have; 'tis undoubtedly true that the King is the Original and Commencement of all Franchises; they have their beginning from him, the Books are clear and full in it: I need not quote them, though there are many, Kelway 138. 17 Ed. 2. 530. in the Reports of those times set forth by Mr. Serjeant Maynard. Now, my Lord, there can be no Corporation, but by the Kings Letters Patents; for even the Prescription doth suppose there was the Kings Patent to create it at first. And therefore the proper Inquiry will be about the Second thing.

II. How far the Breach of Trust that is annexed to a Franchise, is a Forfeiture of that Franchise.

First of all, There is no Rule in Law more certain, than that the Misuser of a Franchise is a Forfeiture of that Franchise. This the Statute of 18 Ed. 2. does very well prove, which was an Act of Grace to restore Franchises to those that had lost and forfeited them. There it was restrained Ita quod libertat' non sint abusæ. And my Lord Coke 2 Inst. in his Observations upon the Statute of Westm' 1. That Chapter of it that concerns Towns that exacted more Murage than was granted, fol. 223. says, They shall lose that Grant for ever; says the Mirror. of Just. which my Lord Coke there quotes, that is no more than the Common Law; for the Law wills that every Man should lose his Franchise, that does misuse it: So the Abbot of St. Albans Case, 8 Hen. 4. 18. The King seized the Franchise into his hand, because the Abbot, who had the Goal, would not give Pledges to make Deliverance, and for detaining his Prisoners a long time without making a lawful Deliverance. And so 20 Ed. 4. 6. The Abbot of Crowland's Case for detaining Prisoners acquitted; after Fees paid the King seized the Goal for ever. These two are cited by my Lord Coke 2 Inst. 43. And in Sir George Reynel's Case, 9 Report, Fitzherberts Abridgment, Titl' coron' placit' 233. A Layman was taken in a Robbery, the Ordinary challenges him as a Clerk, whereas he was a Layman: It was ruled, that for his false challenge the Ordinary should lose his Temporalities to the King, and lose his Franchise to challenge Clerks for him and his Successors for ever. Thus far is plain, That Franchises, if misused, are forfeited; and that though enjoyed by Persons in a corporate capacity, as appears by the Cases put. And then as a Corporation may forfeit any Franchise they are seized of in right of the Corporation, so may a Corporation forfeit the Franchise of the Corporation it self, upon the same ground and reason in Law; unless any one will say, The Franchise of being a Corporation cannot be misused; and that would be a very strange matter to assert.

Every Corporation is entrusted with a Franchise to make Laws for Governing the Subject within its Jurisdiction. If that Power be exercised to the Subjects prejudice, as it may be, it were an hard matter if there were no Law to redress that Grievance. Suppose a Corporation under their common Seal should authorize a Rebellion, would any Man say that were no forfeiture? 'Tis said indeed by

Pigott,

Pigott, 21 Ed. 4. f. 13. Arguendo, upon a Caſe (where the Queſtion is Whether a Corporation ſhould avoid a Bond entred into by the Mayor by Dureſs) That a Corporation can neither commit Treaſon or Felony; but upon the ſame reaſon that he urges, That a Corporation cannot act at all, that is, abſtractedly from all the Members of it; for ſo this Notion is, that a Corporation is a Body in conſideration of Law only, and not reality; and therefore the particular Act even of the Head of that Body ſhall affect him perſonally only. But this is only a Notion of his arguing; but it is the beſt opinion of that Book, that Dureſs to the Members did ſo affect the Corporation, that it ſhould avoid the Bond.

Now, my Lord, a Corporation may be ſurrendred; and ſurely that that may be ſurrendred, may be forfeited; and I ſhall offer you ſome Authorities in this caſe, 12 E. 3. rot. clauſ. memb. 36. A Writ is directed to the Conſtable of Dover, reciting, That the Cinque-Ports had ſeized divers Goods of ſeveral Merchant Strangers Portugueſes, and others, and the Writ commands that Right ſhould be done, or elſe the Franchiſe ſhould be ſeized into the Kings hands, 6 Ed. 2. rot. clauſ. N°. 5. The Liberties of the City of Briſtol were ſeized, and the cuſtody of it granted to for divers contempts and injuries done per Majorem Ballivos & Communitat' to the King, and ſo the cloſe Rolls of R. 2. m. 6.

There is another Caſe that comes further, Paſch. 9 Ed. 1. Majus rot. 25. I find it likewiſe among my Lord Chief Juſtice Hales Collections that he has given to Lincolns-Inn Library; I took it out of that Book: 'Tis in the Collection of the Adjudicata in the time of Ed. 1. fol. 28. a. Thus it was: There was the Abbot of St. Auſtin in Canterbury had made an Agreement with the men of Sandwick about paying ten Hogsheads of Wine yearly to the Abbot; and there was due to the Abbot ſome thirty Marks, and he had Judgment, and Execution went out; and thus 'tis in the Book, Vic. de --- Mandatur quod Levari fac' 30 Marcas de bonis ipſius ad opus Abbatis pro pretio 10 Doleorum Vini annuatim ſolvend' And they made reſcue when the Sheriff came to execute the Writ, and they were ſued for that, and the Judgment of the King and his Council, which was by Parliament, for it was adjourned into Parliament, was Quod Libertas de Sandwick forisfact' ſit. And there is this Obſervation, tho it be written with the ſame Hand, which is not his, but the Clerks that tranſcribed it, Judicium illud extendit contra Barones 5 Portuum & eorum libertates ut mihi videtur. Theſe are the Words of that Book: And this will go a great way with the City of London as to their confirmation of Magna Charta; for the Cinque Ports are confirmed by Act of Parliament as well as they.

But, my Lord, there are many Caſes of like nature, and that even in the Caſe of the City of London too, as I ſhall ſhew you by and by. Now tho theſe are not Judgments in Quo Warranto's to out a Corporation of a Franchiſe of being a Corporation, yet it ſhews that theſe things were forfeitures of all the Franchiſes of a Corporation; for a Seizure is never but where there is matter of for-

forfeiture found upon Record, as in Sir George Reynel's Case; or to ground a forfeiture, upon which to bring a Quo Warranto, as in our Case. But in the Case of 9 Ed. 1. there it does appear Judgment was given by the Parliament, that the Liberty should be forfeited, not that it should be seized into the Kings hands only.

Now, my Lord, where all the Franchises of a Corporation are forfeited, what is the Corporation? Truly, 'tis nothing, 'tis but a Name; a Corporation without a Power to act, is nothing at all: Indeed I do not find any Judgment in a Quo Warranto of a Corporation being forfeited, yet, my Lord, it doth not follow from thence that this cannot be by Law; for many Quo Warranto's have been brought against London, and other places too, to out Corporations of their Franchises, but it hath always ended in submission to the King, and so they have been at quiet. All the Quo Warranto's in Mr. Attorney Palmer's time, after the Kings Restauration, against the several Corporations, they all submitted; and yet that was to question the very being of their Corporations.

Now, my Lord, pray consider a little upon the Rule of Law: It should seem very strange if a Corporation should neglect to come into Eyre, or into the Kings Bench the same Term that a Quo Warranto is brought against them, they must be outed of their Franchise for ever, as 'tis said, 15 Ed. 4.6,&7. And yet, when all the contempts and oppositions imaginable are found upon Record that this should not be a forfeiture, that seems absurd that a Neglect in Eyre should do it, but all the Oppressions and Offences in the World, when found upon Record, should not do it.

But, my Lord, the mischiefs that would follow from hence are very great: How many Oppressions and Offences would be daily committed, if every Corporation were a Franchise and Jurisdiction independent upon the Crown? and the punishment truly of some particular Men for those Offences, would not be adequate, where the power of offending and misgoverning should still remain; sure that were no adequate redress of such an inconvenience. And to this purpose, my Lord, I shall humbly offer a Case, and 'tis that great Case between the Earls of Glouceſter and Hereford, Hill' 20. Ed. 1. in B. R. rot. Wallie 14. 'Tis likewise in Riley's Placita Parliamenti 83, 86. The Case is this in short, They both claimed the Liberty of Returna Brevium, and they had incurred great contempts in refusing to obey the Kings Writs, and Judgment was given against them, That the Liberty should be seized for this reason, which I think will go a great way in this Case, and for which I offer it, Quia puniendus est Dominus Libertatis in eo quo deliquit. I think, my Lord, as I said, that will go a great way in this Case, to shew the Reason of the Law.

My Lord, If the granting of too many and too large Franchises were a mischief, as certainly it was by Law, and as appears by the Commons Petitions 21 Ed. 3. rot. Parl. No. 17. where they pray, That new and large Franchises may not be granted, because it tended to the overthrowing the Common Law, and great Oppression of the People. And the Kings Answer was, That care should be taken

taken for the time to come. I ſay then, if this were ſuch a miſchief, that there ought not to be granted new and large Franchiſes, much more would it be a miſchief if theſe Franchiſes ſhould not be under the controul of the Law when they exerciſe ſuch Oppreſſion. And ſo my Lord I ſhall leave that point; for I think it will be pretty clear, that a Corporation may forfeit their being of a Corporation.

2. I ſhall next than conſider, whether the City of London be in any other plight than any other Corporations. I think truly there is no difference at all. Now this Queſtion doth depend upon what they have ſet forth by their Plea. And that is the confirmation of Magna Charta cap. 9. Civitas London habeat omnes libertates ſuas antiquas & conſuetudines ſuas. And then their Act of 1 E. 3. upon which my Lord Coke in his 4 Inſt. 253. ſays, that the Franchiſe of this City ſhall not for any Cauſe be ſeized into the Kings hands. And then theirs of 7 R. 2. which ſays, that the City ſhall enjoy its whole Liberties, Licet uſi vel abuſi. This is their Foundation upon which they would diſtinguiſh this City from all other Corporations. Now as to theſe things, I give theſe Anſwers.

Firſt for Magna Charta, that plainly is no more a confirmation to them than 'tis to other Cities and Corporations. For not only the City of London is named to have its ancient liberties and cuſtoms preſerved, but 'tis likewiſe Omnes aliæ Civitat', &c. And all Cities, Burroughs and Towns, and the Barons of Cinque Ports, and all other Ports, ſhould have all their Liberties and Frée Cuſtoms. So my Lord Coke agrées it in his Comment. And in what he cites out of the Mirror of Juſtice, and other ancient Authors of our Law, they ſhould enjoy their Franchiſes which they had right to by lawful title of the gift and confirmation of the King, and which they had not forfeited by any abuſe. So that the Act which confirmed them did not purge former forfeitures, much leſs did it licenſe other abuſes.

Then for their Acts of 1 E. 3. and 7 R. 2. I ſhall humbly offer this, That as they are in Truth no Acts of Parliament at all, ſo they will not concern this Queſtion, whatſoever my Lord Coke ſays concerning them. But I ſhall give ſome inſtances before theſe Acts, to ſhew that they never had ſuch an unqueſtionable Power as they now dream of, and then ſome inſtances in after times, that there either were no ſuch Acts, or no ſuch ſenſe at leaſt is to be put upon them as they have ſtrained to make.

Firſt it appears 15 E. 1. that the Franchiſe of the City of London was ſeized into the Kings hand, and Johannes de Britton was made Cuſtos Civitatis London, who was no Freeman; and this implies that the Franchiſe was ſeized into the Kings hands, for they had a power to chooſe de ſeipſis by Charter from King John a Citizen to be a Mayor or chief Governour, but here was another Governour appointed them.

Then Rot' Pat' 26 E. 1. Rex pro bono ſervicio Civit' London' reddit eis Civit' ſuam London habend' dict' Civibus ad volunt' Regis. Teſte Rege. So that both the City and all its Franchiſes were ſeized at that time; for he reſtored the very City of London to the Citi-

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zens habend' during his Will and Pleasure. Thus my Lord it stood in the time of E. 1. Then in the time of E. 2. seized again; 14 E. 2. memb. 21. of the Pat' Rolls in 21 Rex dimisit Civibus London' Officium Major' Civitat' London', 15 E. 2. Rex dedit licentiam eligendi Major' London'. And in the second part of Pat' Rolls 15 E. 2. m. 5. The King recites, That whereas in the Fourteenth year of his Reign he had replevyed to them the Office of Mayor Usq; quindenam Sancti Martini, and also recites which Office was seized into the Kings hands by the Justices of Eyre in the Tower of London, and he was willing to continue it longer to them, ex gratia speciali he did grant them the said Office Quamdiu. &c.

Then the second part of Pat' Rolls in 20 E. 2. it is recited, that the King had seized the Office of the Mayoralty, and had replevied it from time to time; and that one Hamond de Chigwell was made Mayor, the King had excepted of him for Mayor, Et Rex volens eis gratiam uberiorem facere, grants him the Office of Mayor.

Now my Lord, these seizures shew plainly that the Franchises of the City were forfeitable; for either they were seized upon matter of Record found for a Forfeiture, or else upon some matter which was to be a ground of a Forfeiture. So then they were absolutely gon, and I do not find that these were ever taken out of the Kings hands by Process of Law, but were restored by Grace and Favour; for till the 20 E. 2. it appears, that they so long continued in the Kings hands, and he absolutely disposed of them.

Here is now a Favour to them, and a plenary restitution. Thus it stood in the Reigns of E. 1. and E. 2.

Now the next thing will be for their Act of 1 E. 3. which they back with my Lord Cokes observation upon it, that it was Authoritate Parliamenti. Now truly my Lord, there is no such Act of Parliament that is any where extant. For it is not in Print, neither are there any Parliament Rolls of E. 3's time till 4 E. 3. And he that cites it, my Lord Coke himself, cites no Roll at all for it; so that where we shall find this Act of Parliament, truly I do not know. But this Act at best amounts to no more, than that for any personal Trespass of Officers, the Liberties of the City should not be seized; but that signifies nothing, for that is not our Case. There are Acts of the Corporations not of particular Officers; though I cannot but observe how the Law was taken to be at that time before this their pretended Act, even for the Offence of private Officers, and that appears to be the Law too in the Case of 9 E. 1. which I cited before, which was only the Offence of the Mayor of Sandwich, who refused to answer for a Trespass and a Rescue, was committed, and the whole Liberty seized.

Now this Act of 1 E. 3. be it what it will, though they would take it in that sense, that no forfeiture should be incurred for the Trespass of an Officer, yet I find quite the contrary thereunto, and that it hath not prevailed even in that sense. For 5 E. 3. rot. claus. 14. there the King did discharge one from the Office of Mayor, and commands the Aldermen and Comminalty to chuse another. Now this my Lord I take to be not so much a punishing of the Officer as a

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breaking in upon the Franchise it self. But I shall shew more fully in the Reign of K. 2. that this was done.

Yet I will still take notice of the Statute of R. 2. which is the next thing that they rely upon; and this, with submission, is no Act of Parliament neither; for though my Lord Coke in his 4th Inst. 205. says, this is the Statute mentioned in our Books, which supports the Customs in London to devise in Mortmain, and other Customs against Acts of Parliament, and cites Authorities in the Margent; yes, my Lord, I have looked, and can find none of them to speak to the purpose for which they are cited; but the Book of 7 H. 6. fol. 1. where the custom of London to devise in Mortmain is in Question, and there it was ruled a good custom, because of the Statute that confirms it after the Statute of Mortmain, but says, that Book Quere the Statute, so that they were not well apprized of the Statute in those days, tho this were the foundation of all the resolutions of that kind.

It appears by the Roll that it is no Act of Parliament in the nature of it, for its 7 R. 2. N. 37. 'tis a Prayer of the Commons, That there might be a Patent granted to the City, confirming their Liberties, Licet usi vel abusi fuerint. And the Answer was, Le Roy le veult, but this is no Act of Parliament, it is no more than a confirmation of the Letters Patents, which had been primo R. 2. Besides further, there never was any Patent granted in pursuance of this Act: And yet 'tis plain, that if it had been so, it would only have extended to Forfeitures that were past, but could never amount to a Dispensation or Licence for the future. And, my Lord, this appears by these Authorities and Records that I shall now cite. The 1 part of Par. Rolls. 16 R. 2. Membrano 36, 37. whereby it fully appears, That notwithstanding these pretended Statutes, there was no such Privilege in the City, but that for the Offences of their Officers or themselves, the Franchise should be seized.

But, my Lord, I must a little observe, that truly the City have attempted to raise themselves above the fear of any Judgment in any of the Kings Courts; for in primo R. 2. Parl. Roll 126. there they Petition for a Confirmation of their Charter, with a Clause of licet non usi vel abusi, which was that they then would have to be done in Parliament for them. But they do likewise desire in their Petition, that notwithstanding any Statute, Privilege, Charters, Judgment made or to be made to the contrary, their Liberties might be confirmed; of this 'tis said the King will advise. There is in 1 R. 2. Parliament Rolls 121. as pleasant a Petition as the other, they there do desire, that the interpretation of their Charter may be left to themselves; and where it is doubting, such meaning as they should put upon it should be allowable. But to that the Kings Answer was, That he would make the interpretation of his own Charters according as his Counsel should advise. So that I observe, they would feign have been absolute, but they could never do it. It hath always been denied them. So that from what was done at this time and after 7 R. 2. it does appear plainly, that there

was no difference between the City of London and any other Corporation, only this is really the greatest. But as all greatness is the Kings Favour; so when men forget their duty in abusing the Kings Favour, this great Court is the place to put them in mind of it. I come then to the third Question:

III. Whether the Act of the Mayor, Aldermen and Commonalty in Common Council assembled, be an Act of the Corporation, so as to make a Forfeiture of the whole? And with submission my Lord, that will be pretty clear too upon these Reasons:

1. First of all, the whole Corporation is fully represented by them, notwithstanding the disparity of number set forth in their Rejoynder.

2. Again, All By-laws and Ordinances made for the good Government and Order of the City, are certainly the Acts of the Corporation; but the sole power of making those Laws is in the Mayor, Aldermen and Common-Council, and therefore sure the whole power of the Corporation is in the Common Council.

3. They have the sole power of the Corporation-Seal. They can bind all the whole Corporation by any alienation to, or charge upon their Inheritance; and by consequence they may surrender all or any of their Franchises, and then as I said, they may forfeit them.

4. They have pleaded that there hath been time out of mind a Common Council, consisting of the Mayor, Aldermen, and two hundred and fifty Citizens, who are called the Commons of the City. So that it shall be intended now, that as they have prescribed for it as incident to their Corporation, it was part of their Original constitution to be thus represented by them, and ruled and governed by their Laws: But there is another reason for it, and that is, that it is an inseparable incident to a Corporation, implyed in Law without grant, that they have a power to make By-Laws to bind the Corporation, without which there were no government in a Corporation; and therefore a mis-user of that power must be a forfeiture of their Corporation, because 'tis a breach of their Original Trust: 22 Assis. pl. 34. there is this Rule given, and a true one it is, Where there are many Franchises granted which do not depend one upon another, there the mis-user of one is a Forfeiture of that one which was mis-used; but where there are several parts of a Franchise depending all upon the said Franchise, if any part be misused, the entire Franchise shall be forfeited. As for instance, if a man have a Fair, a Court of Pypowders is incident to it, the misuser of that Court of Pypowders, is a forfeiture of the whole Fair it self; for where any part is abused that is incident to an entire Franchise, that abuse forfeits the whole. And this is the Opinion of Palmers Reports in the Case of the Corporation of Maidenhead, where 'tis doubted whether the Market was forfeited for taking too much Toll, because the Toll was not inseparably incident to the Market, and so was not dependant upon the entire Franchise, and there the rule is taken as I have said before, that the mis-user of a part of an entire

entire Franchiſe, or a power that is incident to it, is a forfeiture of the Franchiſe.

Then my Lord, if they cannot forfeit here, the whole power of the Truſt of the Corporation is repoſed in them, and may be miſuſed by them, to the Oppreſſion of the Kings Subjects, and there is no remedy, if they ſhall not be puniſhed at all. For it is much harder to ſay, that ſeveral Acts of all the particular perſons, ſhould forfeit the Corporation, than that their Joynt Act ſhould do it. But this my Lord, is an Act contrary to the truſt upon creating the Corporation, and may be a miſ-uſer to the prejudice and oppreſſion of all people; and if this ſhould not forfeit the Corporation there is no remedy at all, but the power remains of oppreſſing as it did before.

Now my Lord, I think, with ſubmiſſion, I have made it pretty plain; and as they are not diſtinguiſhed from other Corporations in point of priviledge as to forfeitures, ſo this is their Act, and ſhall bind them, being done by their Repreſentatives.

IV. Then the fourth point will be, Whether theſe Offences ſet forth in the Replication are Forfeitures?

1. The firſt is, the making of that Law in the Common Council for the levying of ſums of mony upon the Kings Subjects, and the actual levying of thoſe ſums accordingly; and this they juſtifie under their preſcription to have reaſonable Tolls, as they ſet forth in their Pleadings, from all Perſons that come to their Markets to ſell Proviſion there, and power to reduce their Tolls to a certainty by an Act of Common Council. This is their Juſtification; ſo that, my Lord, the firſt thing to be conſidered is,

I. What right they have to theſe Tolls or Sums of Mony aſſeſſed by the By-law; and then

II. Whether if they have no right, their taking upon them to make a Law be a Forfeiture?

For their Right, that depends upon a preſcription to have reaſonable Toll, as they ſet it forth, and this as they have pleaded, it appears to be no Right at all; for a Preſcription to have Toll and Tollage, not ſhewing how much in certain, is void; for reaſonable Toll is not incident to a Market, but the Party has it by the Kings Grant, and ſo 'twas adjudged in this Court, Mich. 39. & 40. Eliz. cited by my Lord Coke in his Second Inſt. 220. So if the King grant a Toll, if he do not in his Grant aſcertain how much ſhall be taken for Toll, that Grant is void: And ſo is the Preſcription too, as you may ſee in the Corporation of Maidenhead in Palmer's Reports, fo. 79. grounded upon 9 H. 6. 45. & 11. H. 6. 19. and ſo he cites the Opinion of Popham in the Caſe of Heedy and Weeldhouſe, for no Subject can preſcribe to have Toll, but by the Grant of the King.

But, my Lord, this is not properly a Toll neither, nor in the nature of a Toll; for that is always paid by the Buyer, and never paid before a Sale; but here all that comes to the Market, whether they buy or not buy, ſell or not ſell, they muſt pay by this Law.

My Lord, I confess there may be a custom for Persons to pay for Standings in a Fair or Market, as that Case was 9 H.6.45. but yet that must be prescribed for in a certain Sum, which is not done here. And this customary Payment is in the same nature as a Toll traverse, or a Toll through, which cannot be in an uncertain Sum; for they are all by prescription, and a Grant of them now uncertain would not be good.

But, my Lord, however, Judgment upon these Pleadings must be given against the City; for either the Prescription, as they have set it forth, is good, or it is not good; if it be good, then the Traverse that is taken is well taken, to wit, that they have no such Custom, and they ought to have taken issue upon that which they have not done; for, my Lord, they have taken issue thus, That, time out of mind, they have had reasonable Toll of all Persons coming to the Market to sell their Provision, without tying of it to the reasonable Toll assessed and reduced to certainty by the Law; and this is naught; for tho they had a reasonable Toll in general, taking the Prescription to be good, yet if either that reasonable Toll in the use of it were not taken in that manner, or to that value that they assess by their By-law, then have they done wrong; and therefore our traverse is proper to their reasonable Toll, that they had not, time out of mind, such a Toll as they set forth; for it must be such a reasonable Toll as may answer to that which is assessed in the By-law, and that they have not put in issue. For the King, when once he hath granted a Market, cannot after grant Toll to that Market, because it is a free Market, and the People have right to come to it as a free Market; neither can they, when once by custom they have exercised their Power of assessing reasonable Toll, alter that at their pleasure; for it being once set, all People have right to come upon such terms: And if they increase the Toll, under pretence to reduce it to certainty, it will be void; for they may lower their Price if they will, but they can never come to increase the Penalty. If therefore they have done ill in not taking issue upon the Traverse, which does take in the full substance of their Rejoynder; if it be good, then Judgment must be given against them upon that reason; so then, my Lord, the Question will be,

Whether the making of a Law to raise Mony at large upon the Subject be a Forfeiture of the Charter? And truly, my Lord, that it is. For

I. 'Tis the usurping of a Power that they neither can have, nor have by Law.

II. 'Tis a Breach of the Trust annexed to the Corporation; for 'tis a Misuser of the Franchise to the oppression of the Kings Subjects; and therefore the Charter must be forfeited, and not the other Franchise; not the Franchise of a Toll, for they have none; not the Franchise of the Market, for that would be nothing. If the Market be forfeited, it must either be extinguished or kept; if it be extinguished, 'tis a punishment to others that did not offend; and if it be kept, that it be forfeited, 'tis no punishment to them that do offend: And 'tis a Question whether a Market may be forfeited for taking unreasonable

Toll

Toll, and that appears in the Case of Maidenhead. And as my Lord Coke says upon the Statute about taking Outragious Toll, the Franchise should be seized only till it be redeemed by them.

But my Lord however, without going far into that matter, this Offence lyes not only in taking the money, but in taking upon them, and usurping a power to make Laws to raise money. They have taken upon them a Legislative Power to oppress their fellow Subjects, that is their Offence, and that is a mis-user of their Franchise. My Lord, in the Case of Ship-money, it was not the Quantum of money that was raised that was complained or quarrelled at, but it was the manner of levying of it without an Act of Parliament. The Logick and Consequence of that was it which was so much debated and stood upon. So here, the abuse and the offence is the making the Law, and the consequence of that; for by the same reason that they have a Prescription to lay so much, they may have a Prescription to lay ten times as much. So that upon what I offer upon this point, I conceive it ought to amount to a forfeiture of their Charter, and the loss of their Corporation.

Then the next thing will be that which is the last matter, that is the Petition, and that is of a strange Nature; where the Offence is not only in Presenting, but in Printing and Dispersing of it; it charges the King with interrupting the publick Justice of the Nation, and the making the Necessary Provisions for the Security of his Protestant Subjects; for, my Lord, to say, that the Prorogation of the Parliament, which is the Kings Act, who surely has alone, and none but he, the undoubted Prerogative of Calling, Proroguing, and Dissolving Parliaments; to say that Act of his was an Interruption of Justice, is all one as to say, the King did interrupt: and 'tis done by them as a Corporation; 'tis the Act of the City in their Common Council in the Name of the Corporation; and as we have pleaded it, the Mayor, Citizens and Commonalty in Common Council did do it, which sure is the Corporation, as they would have it. And that I rely upon for the reasons I offered before upon that point.

Then the matter of this Petition is, the taking upon them to censure the King and his Government by this Petition. The Printing and Dispersing it, is now publickly Scandalizing and Libelling the King; for 'tis in the nature of an Appeal to the people: 'tis unlawful to Print any mans private Case, while it is depending in any Court of Judicature before it comes to Judgment, because 'tis an Appeal to the people. And that was my Lord Chief Justice Hales Opinion in Colonel Kings Case. And the ill consequences of such proceedings are so many, and the danger so evident in these Licentious days, that I do not know indeed whether it may tend.

The fact is confessed by them in their Rejoynder, but they say they did it to alleviate mens fears, and quiet their minds absq; hoc, that they did it aliter vel alio modo. Surely my Lord this is no sort of excuse in the world, nor is it capable of any. They have owned

owned the thing, but they have excused it in the manner of doing thereof. And I may venture to say the Traverse is impertinent: Suppose a Man be Indicted for publishing a Libel, and he owns the Fact, but doth traverse absq; hoc, that he did it malitiose, or with an intent to defame, that surely would be an idle thing; for those are constructions that the Law puts upon it, and are not matters traversable, or to be put in issue. But if the Fact be done, the Law says 'tis maliciously done, and with such an intention. Therefore a confession of the Fact is a confession of all the consequences that the Law puts upon the Fact.

My Lord, this can amount to no less than the forfeiture of their Charter, not only for the greatness of the Offence, but because otherwise the Law would be unequal; for if this were the Case of a private common Person, he must be fined and imprisoned during the Kings pleasure, as was the Case of Harrison in 1 Cr. 503. for words spoken of Justice Hutton. Now, my Lord, a Corporation is not capable of suffering this Imprisonment, and therefore 'tis a much greater Offence in them, as the Body is greater than any particular Member: And then, that which is a greater Offence would have a less Punishment if the Charter it self were not forfeited, than it would if a particular Person were punished. And give me leave to apply here the Reason of the Earl of Gloucester's Case, that I cited before, Quia Dominus Libertatis puniretur in eo quo deliquit. So they shall lose their Charter for the abuse of that Power that was entrusted with them by their Charter. Therefore upon the whole matter, I do humbly pray your Judgment for the King, that they may be outed of their Franchise of being a Corporation.

Sir

Sir *George Treby* Recorder for the City.

THE firſt thing that I ſhall, I hope, maintain, is,

I. That a Corporation, or the Being of a Body Politique it not forfeitable.

The Nature of a Corporation in its Exiſtence, Powers and Actions is to be conſidered.

A Body Politick or Corporation is created by the Policy of Man, 1 Inſt. 2. The Perſons Incorporate are created a Body, and are of capacity to take or grant, do, or act, according to the Powers and Authorities in their Creations given them, and to no other purpoſe, only a Capacity, and not properly a Franchiſe.

1 Inſt. 250.

Brook therefore in his Title of Corporation, makes his Title, Corporation or Capacity.

2 Bulſtrode 233. The Body is inviſible, therefore cannot appear in Perſon.

Diſſolution of a Corporation there may be: As where the Perſons incorporated all dye, Corporation of neceſſity is thereby diſſolv'd.

1 Inſt. 13. b.

Rolls Ab. 1. 514.

But no Book or Caſe mentions Diſſolution by Forfeiture.

In the time of H. 8. when the Corporation of Monks, Nuns, and other Religious Houſes were diſſolv'd,

Had it not been a very eaſie way, if this Doctrin of diſſolving by Forfeiture would have done it, thereby to have effected the Kings purpoſe?

It was but to have iſſued out a Commiſſion, and thereby find out one illegal Act or Miſcarriage done by the Corporation, and thereby the Corporation diſſolved.

But in Henry the Eighth's time, or afterwards, the Surrenders made by Corporations was of their Lands, not of their Corporations or Bodies Politique, as appears

2 Anderſon 120.

Dean and Chapter de Norwich's Caſe, 3 Rep. 74.

For tho they ſurrendred their Church, and all their Poſſeſſions and Franchiſes, yet the Corporation remain'd, not thereby diſſolv'd.

Fullcher and Heyward, Jones 198. Palm. 491. Davyes Rep. 1. b. And Encounter le Opin. Dy. 273. 282.

And therefore to this time, viz. 3 Car. I. when theſe Caſes were adjudged and argued, the Law was taken to be, that a Corporation could not be diſſolved by Surrender.

And

And the Statute 27 H. 8. 31 H. 8. 34 H. 8. for dissolving the Monasteries, none of them mention Surrender of the Corporations.

And tho' the word Forfeiture be in those Statutes, thereby is not meant forfeiture of Corporation, but forfeiture of the Lands of the Abbots by Attainder, viz. Abbots of Glassenbury, Colchester, and others, attainted upon the matter of the Kings Supremacy.

And so it appears, Rolls 2 Rep. 101.

But if it should be admitted, That a Corporation may be surrendred, and thereby extinct and destroyed, it is no consequence that they may be forfeited.

For there are many things surrenderable that are not forfeitable: As Annuities granted pro Concilio impenso & impendendo, which are personal Interests, and so tied to the Person, as not transferable by Grant, Forfeiture, or otherwise.

Much more then of a Corporation, which is far from being grantable or forfeitable; it is the very Capacity or Existence, and inseparable in its Nature from the Persons incorporated.

Worseling Manings Case, Lane 58. Rolls, Abr. 1. 195.

Alien obtains Letters Patents of Grant of Denization, Provisо, That the Grantee do his Legal Homage, and be obedient to the Laws of the Kingdom.

He never doth his Homage, nor is obedient,

He shall not here by forfeit or lose his Denization or Capacity that he hath granted him by his Patent.

II. That this Information now brought is insufficient, and no Judgment against the Corporation can be given upon it.

It cannot be maintained against the Corporation as now brought, but should have been against the particular Persons.

Rex vers. Cusack, Rolls, 2 Rep. 113. 125. Palm. 1.

In a Case of great Authority, and upon a Writ of Error out of Ireland upon a Judgment in a Quo Warranto against the Corporation of Dublin, a Quo Warranto was brought against Cusack and others, Aldermen of Dublin, who pretended to have Privileges, and a Guild, and to be a Corporation; and this, I presume, is for their being a Corporation; for there is a Cur' advisare vult upon that, and 'tis not put in the Case; but 'tis also brought for several Liberties that they did pretend to claim, that they only, and no others, should sell and buy all Merchandizes there, and no body should buy of another, or sell to another, but to them; that all Merchandize should be brought to their Common Hall there, &c. Now as to those Liberties, they are forejudged, that the Liberties should be seized, and they outed: As to their claiming the Corporation, there is a Cur' advisare vult, so the Case is in Palmer; but in the other Book, Rolls 115. there 'tis agreed, If a Quo Warranto be brought to dissolve a Corporation, it ought to be brought against particular Persons; for the Writ supposes that they are not a Corporation, and 'tis to falsifie the Suppositi of the Writ, to name them as a Corporation. Now here this Writ supposes them to be a Corporation

ration, or elſe they could not be Defendants, and then it comes and falſifies that ſuppoſal, by aſſigning that they are no Corporation, nor ever were; or if they had, they have forfeited it; and ſo all the foundation that this Writ ſtands upon is deſtroyed. My Lord, in this Caſe of Cuſack I am aſſiſted further with a Report of it in my Lord Chief Juſtice Hale's Book; a Report of very great Authority with all Men of our Profeſſion, and there he ſays expreſly, If a Quo Warranto be brought for the Uſurping of a Corporation, it muſt be brought againſt particular Perſons, becauſe it goes in diſaffirmance of the Corporation, and Judgment ſhall be given, that they be outed of the Corporation; but if it be for Liberties that are claimed by a Corporation, it muſt be brought againſt them as a Corporation.

'Tis in my Lord Hales Common Place Book, which is in Lincolns-Inn Library, fo. 168. placito 7. My Lord, this is our very caſe; if you go about to ſay our Corporation is forfeited, or muſt be diſſolved; nay more, you ſay it has either never been, or by forfeiture it is loſt ſo long ago, then here is nothing can come before the Court. This Information is brought in diſ-affirmance of the being of the Corporation, and therefore there muſt be ſet up ſome body capable of being a Defendant in ſuch a Suit, and that is, particular Perſons, which ought to have been named, as was in that Caſe of Cuſack: For as the Judgment of Ouſter of particular Liberties given againſt particular Perſons will not bind the Body of the Corporation; ſo the Judgment of not being a Corporation will not be good to charge or oblige particular Perſons, unleſs it be given againſt particular Perſons that uſurp the Corporation. The Individual Freemen of London cannot poſſibly be bound by this Judgment; for they are not here before you, nor were they ever ſued: For it is the Corporation that is here made Defendant; and I do not conſider the number that make up that Body, that London's being populous alters the caſe; for the caſe is the ſame if it were the Corporation of Quinborough, or any other petit Corporation. Suppoſe 20 Men be a Corporation, or pretend to be a Corporation, and you come to enquire by what particular means theſe Men pretend to be a Corporation, or as the words of this Quo Wartanto are, uſurp to be a Corporation, you muſt not ſay, that they are one, and then ſay they uſurp it; for 'tis not the Corporation that uſurps to be a Corporation, that is impoſſible, but 'tis the particular Perſons that uſurp to be the Corporation, when indeed they are none. A Corporation may uſurp a Market, or they may uſurp a Leet, but they cannot uſurp themſelves.

It appears, my Lord, in Mr. Townſend's Book of printed Preſidents, a laborious thing it is, and wherein he hath collected all the Preſidents he could meet with of Quo Warranto's, and there is but one in all that Collection that was brought againſt any Perſons upon the ſcore of their being a Corporation: And what is that? how was it brought? not againſt the Corporation that was, but againſt the Corporation that never was, that is to ſay, a parcel of People that took upon themſelves to be a Corporation, when indeed they were not, and that is but one ſingle Preſident neither. In Coke's

Entries, 527. Tit. Quo Warranto, the King against Helden and other Burgesses of Helmesly for usurping to be a Corporation, by the name of the Burgesses of Helmesly: How does the Attorney General there bring his Writ? he brings it against particular Persons. My Lord Hobart, who was then Attorney General, never thought he could have maintained his Quo Warranto, or expected Judgment against them, if he had brought it against the Burgesses of Helmesly generally, and then have said, that they were no Corporation; but he brings it against those particular Persons, and thereupon they come in and disclaim their being such a Corporation, and the having the other Liberties; and the Judgment is, That of those Liberties those particular People should be ousted, and should not intermeddle with them.

Now, my Lord, what Judgment can be given in this Case, that the Mayor, Commonalty and Citizens shall not intermeddle with the being of Mayor, Commonalty and Citizens? 'Tis a very reasonable Judgment that Helden and those particular Persons should not intermeddle with such a Liberty, or be in such a Corporation; but if such a Judgment be given against the City here, that would be as much as to say, That you have never been what you are, or you shall never be what you are, that is the English of it.

And, my Lord, I am sure as there never was but one Quo Warranto that we can find any printed President of against the being of a Corporation, so that very President is not against those that really were so, but particular Persons that usurped to be so. And if you search all the Records of this Kingdom, and all the Books in all the Offices, you will never find any that is brought against a Corporation, for being a Corporation, upon pretence that they might be made none by a Forfeiture; and no Prerogative of the King shall extend to excuse this, but his Action shall abate, if it be not right brought, as well as the Subjects, and so is Plowd' Com. fol. 85.

Further, my Lord, I have another Authority in this point, and that is in the Case of the Corporation of Maidenhead, which hath been so often cited by Mr. Sollicitor, and it is in Palmer, 80, 81. where 'tis said, When the Attorney General hath supposed them to be a Corporation, it is not usual to plead them to be a Corporation; otherwise if he had questioned them as Inhabitants of such a Town, then they ought to enable themselves: Those are the words of that Book: And what can be more plain? Here the Attorney General supposes us to be a Corporation, his Replication flies in his own Face; and he having supposed it at first, he is bound not to question us for our being a Corporation at any time after. As to the business of forisfecerunt, 'tis a strange and a new word that never came into any Quo Warranto before, that I know of; but we will accept the new word, but not the thing, and that they have forfeited by such and such Acts; this sure will be very hard upon us; for if it be a Forfeiture, it must relate to the time of the thing done, to the time of the making the Act of the Common Council, to the time of the Toll levyed, or to the time of the Petition; and if it do so, it must relate like a Forfeiture for Treason; it must reach all mean Acts,

all

all the Leases that we have made since are gone; all the Judgments that we have given in any Cause are Coram non Judice, and void; all the Acts of the Corporation are overturned by this forfeiture, and we have been under a vast mistake all this while. We have had no Mayors nor Sheriffs, no kind of Officers, no manner of regular and legal proceedings; but we have been under a great mistake ever since this money was obtained or levyed. We have forfeited all; and that it is so, is plain, because in all Quo Warranto's wherein persons are convicted for usurping of Liberties, there is a Fine set upon them for continuing that Usurpation, and reason good; then if it be an Offence for continuing the liberty, we must be fined for doing it ever since the Forfeiture, when if Mr. Attorney General's Rule be right, there has been no such Corporation; but we ought to have discontinued all our acting as a Corporation, and laid it down, and so every step that we have taken since hath been irregular, and every Act void.

If so be an Action be brought against Baron and Feme, and the Plaintiff should in his Replication say, they were divorced several years before, has he not undone all his pleading? Here then is our Case, Mr. Attorney General admits us to be sueable, and yet charges us to have no capacity to be sued. I do implead you, but you have no right to be impleaded; here he brings us into a Court, and when he has brought us here, he quarrels with us for being here; he makes us Defendants, and then questions whether we ought to be so; and so his great Charge against us is, that we are what he would have us to be, and what he hath made us to be; for if a Month before the Information, the Corporation was not, but the very being of the Corporation was usurped, how come we at the Months end to be Defendants? Here comes a new creation interposed in that time, and makes us parties sueable in the Court, when by the Charge in the Information we were not so a Month before.

And then my Lord the Information is not quite so bad, but the Replication is worse; first he takes Issue that we never were a Corporation at all; and the next thing is, if ever you were a Corporation, you have ceased so to be, because you have forfeited it so and so several years ago. This is just then to put a common Case (and I confess a very familiar one it is) If I should bring an Action against a man, and when he hath pleaded, I should by way of Replication set forth, there never was any such man as the Defendant, and take Issue upon it; or if there were, that he was dead Ten years ago: And yet this is the substance of Mr. Attorneys Issue, and his Replication.

My Lord, the Authorities before cited in Palmer, Coke, Entries, Rolls, and my Lord Hales Common-place-book, are not all; for I have some other that never saw the light in Print yet, and that is the Case of the King against Bradwell and others, Trin. 18. of this King. A Quo Warranto was brought against them for usurping to be a Corporation, or Company of Musitians; it had been

a strange thing if the Quo Warranto had been brought against that Corporation, and then the Attorney General had said they were no Corporation, nor never were; there they did think best and fittest to go against Bradwell, and the rest, and that by name and only so, not against the Body Corporate. So in that Case of the Corporation of Worcester, which was lately tryed before your Lordship in this Court; When the Quo Warranto was brought against such men for usurping to be all Aldermen and Common Councilmen, if the Attorney General had once called them Common Councilmen, it had been a great repugnancy for him afterwards to say that they were none, or if they were, that that priviledge of theirs was lost so long ago. So in the Case of the Quo Warranto against the Bermudas Company; it was against a Corporation, and against particular persons by name both. These things have been considered, and doubtless they have gone on in an ordinary way. I must confess, I was not privy to that particular Case, but by the Report of that Case, which I have seen, I have been informed that the Corporation never appeared; for they said, 'tis not sense for us to appear; for it being a Question by what Warrant we are a Corporation, it is not we supposing us a Corporation that do usurp, but the particular persons that do usurp, if it be at all usurped. Now my Lord if that had been a regular Suit, no doubt but there would have been Judgment against the Corporation, which there was not. And certainly the Replication of Forfeitures was not good against the Corporation, but against the particular persons only.

All Mr. Solicitors Authorities for Seizing hold true, if the Corporation would never appear: And what is the reason it should be brought against J. S. and J. N. but because Corporations do never appear in such a Case, in regard it were not congruous they should appear; for the Quo Warranto must intend it so, That they were not a Corporation in being, by implying a Forfeiture. Then say I, no Judgment at all can be given upon this Score, Non admittitur exceptio ejusdem rei cujus petitur dissolutio, a man shall never be admitted to controvert that to be in being, which he himself desires should be destroyed, and so has allowed it to be. Shall Mr. Attorney be admitted to deny the supposal of his own Writ? and truly I think I might very well leave this part of the Case, and this point, to Mr. Attorney General himself; for if he will have any thing to be answered by us, he must maintain us to be a Corporation capable of answering; and so I have reason to expect that against his short Replication he will be pleased to support the being of our Corporation, and so dismiss us hence.

II. My Lord, I have done with this Point, and now I come to the Replication, which indeed is a kind of a new Quo Warranto, for it brings in new matter, and therein they do charge two Forfeitures, the one is by reason of the abuse of the Market, the other is by reason of the Petition: My Lord, I shall answer both of them, That we were seized of the Market, that is pleaded and that is agreed: That we

were

were ſeized of Tolls, and were to have reaſonable Tolls, that is agreed too; that there is a cuſtom in London to have Common Councils, and that this was by Common Council is agreed; all this is agreed by the Demurrer; that this Toll (though by the way I muſt confeſs, and will agree with Mr. Sollicitor, that it is not properly to be called a Toll; for a Toll is only for Goods ſold; and when they are ſold, in recompenſe for the Officers attendance for the teſtification of the Contracts, and the entring them in their Books. But I agree, this is not ſuch a Duty for Goods bought and ſold, but it) is for the accomodation of Perſons repairing thereunto for their Stalls; and if I would call it by any particular Word, I had rather call it Stallage than any thing elſe: It is for thoſe Accomodations which we have bin at vaſt charge in preparing and providing, and for the maintenance of requiſite Officers, and for the cleanſing of the Markets. Now Mr. Sollicitor objects, That we cannot preſcribe for a Toll uncertain, and he cites the Caſe of Murage, and the like; and ſo I muſt confeſs, where Murage is granted, 'tis commonly a thing certain, ſo is Pontage, and the like; but I believe (if I had thought that it would have been a point inſiſted upon) I could have brought you Inſtances where Murage, and ſuch like things, have bin granted in general, and they would have bin ancient ones indeed: And there is a neceſſity for it in ſome caſes; for when a Town will repair its Walls, the charge may be greater or leſs, as the particular Accidents may be, and ſo perhaps a certain Duty would not do it. When a Wall is to be built, there the Duty may be certain; but when it is built, to keep it in Repair, the Duty of Murage may be uncertain, according to the charge; and if the caſe be not ſo, it will come little to our purpoſe, which is a Duty upon a great and a continuing charge. I will name him ſome things that he muſt agree, and I know he will grant, are uncertain, as Pickage and Stallage, which are Duties for picking in my Earth to dig holes for the Poſts of Stalls to be fixed in: now there can never be, nor ever was any circumſcribing in thoſe matters, for circumſtances in every of thoſe caſes muſt govern it. If I have occaſion for my Stall to uſe a foot of ground, one ſort of Sum is neceſſary; if ten feet, another Sum; it ought to be equal indeed, but it could never be good if it were limited to a Sum certain; and in all grants that ever were of Pickage and Stallage, they were never reduced to a certainty, and thoſe are things too that relate to a Market.

And ſo I take it to be for Keyage, Anchorage, and the like; for when there are Poſts or Places for Ships, to which they may be fixed, the Owner of the Port may have a compenſation for that, but that muſt needs be uncertain, according to the circumſtances; if a Ship be bigger or leſſer, if a Ship ſtay a Month or a Day, 'tis not fit the ſame rate ſhould be paid, nor is it uſually granted by particular words, Co. Ent' 535. & 526. placit' 4. The King againſt the City of London for the Water-Bailage, and other things. They pleaded only a Right in general, and do not ſay what the Particulars were; and yet one of the things demanded in the Quo Warranto, was, as I

ſaid,

said, the Water-Bailage, which sure if any thing ought to be certain, that ought. In that Case it was good Pleading, though I think I could say more against it, than this thing that is in the nature of Stallage; so that all that Mr. Sollicitor hath built upon that must, I think, needs vanish.

My Lord, I do not think but London ought to be, and is as much under the obedience and correction of the King, as any City; but yet I believe in these Cases of their Customs, you will give that allowance and indulgence to it that all your Predecessors have done, which is greater than they have given to any other Corporations in the Kingdom, and that because it was London; that there should be such a thing as a Foreign Attachment, I think is hardly allowed in other places; I am sure I have known it deny'd in some, that a Contract in Writing should be equal to a Book Debt; that a Feme Merchant should sue or be sued without her Husband; or if he be named, he should be only named for conformity: You take notice that London is a Port-Town, and that Men that Trade there, sometimes go beyond Seas, and in their absence their Wives trade by themselves, and perhaps carry on distinct Trades while they are here: And so they may do in other places may be, but only for the sake of London do you take notice of these things there and not elsewhere; their Penalties that are sued for in their Courts, a great many of them are such as would not be well maintained in other Courts, or in any other place, and yet they are maintained there, as namely, That their Penalties should be sued for before the Mayor and Aldermen, when the benefit of them goes to their use; and yet that is allowed in the Eighth Report, notwithstanding the grand Objection, That they are in some sort Judges and Parties, Rolls 2 p. Abr. Tit. Prescription Letter H. fol. 266. N°. 2. & 3. The City of London may prescribe to have a Court of Chancery in London of matters tryed in the Sheriffs Court, though such a Court cannot be granted by the Kings Letters Patents; but the Mayor and Citizens of York cannot prescribe for such a Court, because it were very dangerous that such petty Corporations should have such Courts. And whatsoever is said by my Lord Hobart in his Reports 63. I do affirm there is no Act of Parliament that erects a Court of Chancery in London, or the Cinque-Ports; if Mr. Sollicitor had struggled with me about the being, or not being of that Act of Parliament, I would have agreed with him that there was no such, sooner than some that he says are none. The Customs of London have been upheld; and I must confess I think that is very strange, even against the general Words of an Act of Parliament, 2 Inst. 20. A Goaler in London may permit his Prisoner, that is in Execution, to go at large with a Badge in any place within their Jurisdiction, and 'tis no escape. And so is Plowdens Com. 36. A Citizen of London may set up one Retail Trade, though he was bred to another, notwithstanding of the Stat. 5°. of the Queen. And for a General Rule take that that is said in Palmer 542. Those of London may prescribe against a Statute, and the reason is, because their Liberties are confirmed by

Statute,

Statute, and other Towns are not. In Rolls Rep. 1 p. 105. Sprike againſt Tenant, my Lord Coke being then Chief Juſtice, ſays, We take notice of the Cuſtoms in our Courts, and other Courts in Weſtminſter-Hall, and in London. Fleetwood Recorder of London ſays a very ſtrange thing in 1 Leon' 284. Hollinſhead and Kings Caſe, and in 4 Leon' 182. That the King's Courts ought to take notice, that thoſe of London have a Court of Record; for if a Quo Warranto iſſues to the Juſtices in Eyre, it does not belong to them of London to claim their Liberties, for all the Kings Courts have notice of them. And truly I have been enformed, I mean by Copies of Records, that when the Juſtices in Eyre came to the Tower, this was a Priviledg allowed to them, they were not bound to ſet forth their Liberties as others were.

My Lord, I think this, as 'tis pleaded, is a Duty very juſtifiable, and very well payable, by vertue of this Cuſtom. I do agree, as I ſaid, a Toll is properly for Goods ſold, and this is a Cuſtom for the accommodation of thoſe that brought Goods to be ſold, and 'tis like that 1 Leonard 218. my Lord Cobhams Caſe, a Duty paid for the ſtanding in the Cellar, and there that is held to be good. In Rolls 2 p. of the Abridgment 123. Letter B. Hickman's Caſe. The Lord of a Mannor may preſcribe to have the eighth part of a Buſhel of Corn in four Buſhels that are brought to the Market within the Mannor in the name of the Toll, and that is for Stallage only, for it is ſaid there, whether it be ſold or not. And in the ſame Book, fol. 265. the City of Dublin ſet forth, that they are owners of the Port of Dublin, and that they maintained Perches in the ſaid River, to direct the Ships in the deep Channel, and that they kept the Key and the Crane, and therefore in conſideration of that, they preſcribed and demanded three pence in the Pound for all Merchandizes in the ſaid Port, and it was held good. Now I agree Toll-through that can't be preſcribed for ſimply and generally, but by Toll-through I mean as you know, for paſſing and re-paſſing through only, and not for ſtaying; but yet even that may be preſcribed for too, in conſideration of repairing a great High-way, or a very foul way, or maintaining a Bridge, and the like. And therefore if our Conſiderations here be as good, as that we maintaining thoſe great places may preſcribe for this duty, as for paſſing through the Streets, though it were no Market.

There is a famous Caſe reported in Rolls 1 p. fol. 1. & 44. And 'tis in 2 Bulſtrode, and alſo in Moor, it was the Caſe of the Bellman of Litchfield: A Preſcription is made, that the Corporation of Litchfield hath a Market, and they ought to repair the way to it, and to appoint a Bellman that ſhould ſweep the Market-place, and that for this the ſaid Bellman, time out of mind, had taken of thoſe that brought Corn to the ſaid Market, and opened their Sacks to ſell a pint of Corn, if but a Buſhel or under, if more a Quart. So that if it were opened and not ſold, yet he was to have that Duty, and that Preſcription was adjudged to them by all the Judges, and yet it does not appear there, whether the repair-

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ing that way cost them 5 s. or 5000 l. and yet by intendment they would not account it unreasonable, though it might have been urged it was very unequal; if they could take a Pint for that which was under a Bushel, perhaps they would take by that means, half of what the party bought; but if there were fifteen Bushels they had but a Quart, and this was objected as to the inequality of it; and yet they all passed over that by a reasonable intendment, and would not deny the Prescription to be good. And the Case of Cranage in Dyer, and the Case of 21 H. 7. 16. are admitted to be good Law, where the Town of Glocester prescribed for a Toll of Boats passing by the River near the Town.

Now my Lord for ours, there was very great reason to induce it, the great alterations that were made in London by the Fire; and it was not the first time that London was burnt: And if there should be War, and so great Alterations and Confusions, there were great cause that the City, that lays out great Sums, and must be at such a publick Charge, should not be losers by it.

And we do set forth more than they do in the Case of Litchfield, that we provided the Market-places at our own charge; and if they will use them, they must expect to pay some compensation for it; that we do keep Officers, and pay them for cleansing and keeping Order in the Markets: And above all that, we provide Standings and Stalls, and such Accomodations, and that I am sure is a Provision no Lord of a Market is bound to make unless he will, and therefore the Market-people that are accomodated by it have great reason to pay for it; and we pay all the Taxes for the Market-places, for the ground is ours; and that is not alledged in the Pleading indeed, but it must be implied, because we pay the Taxes, and they that have the Standings are not lyable to pay the Taxes: And so is the Judgment in Rolls, 2 p. 238. and the 2d Abr. 289. And in the Case of Cusack Justice Dodderidge says, That the redeeming of one Fair from the Abbot of Westminster cost the City of London 8000 l. for he had a Fair at Westminster, and a Market for 40 days, and that during that time no Sale should be in London, or the places adjacent, and a great Rate it was if it were so. The measure of a Toll is according to my Lord Coke 2 Inst. 58. when the thing demanded for Wares or Merchandizes does so burthen the Commodity, that the Merchant cannot have a convenient Gain by Trading therewith; and thereby Trade is lost or hindred, then 'tis an evil Toll. But here indeed the Market-people are better accommodated than ever they were; and Trade is so far from being discouraged, as that it is increased, as is implyed in the Replication; for 'tis said, we receive 5000 l. a year, which if it were so unequal, would not certainly be paid, nor could be, if there were not great Trade there. So that the increase of Trade is the thing complained of in this Quo Warranto. And the truth of it is, I have examined and looked into the Fact of these things, and there is nothing in this By-law, but what was really anciently paid, except only in one Instance, whether it

it were 6 d. or no, that was paid when a Cart was drawn by two Horſes, which now is but 4 d. and if we have increaſed the Toll, which I doubt whether it be ſo or no, 'tis only in a very trifle.

Now my Lord, this Caſe I think is a ſtronger Caſe than that in 5 Rep. the Chamberlain of London's Caſe, there is no conſideration of Stalls, or cleanſing the place, but only they had an Officer to ſearch and view, and that was a new appointment of their own; they could not preſcribe for it, but it was thought a penny was a reaſonable recompence, and the Subject had a benefit by it; and if he would bring his Cloth to London to be ſold, he ſhould come thither to have it viewed, and give a recompence for it. Now London is all Market indeed, every Shop is a Market; and it hath been well ſaid of the Judges ſeveral times in Weſtminſter-Hall, that London is the Market of all England, and there is never an Acre in England but is the better for that.

As to the Impoſition upon Coals, that is but an inducement, and an inducement is never to be relyed upon; 'tis not to be ſtood upon. And Mr. Solicitor did very honourably decline it, and did not make any thing of it, nor trouble the Caſe with it.

When the City did make this Act of Common Council, they did conſult with their Counſel for matter of Law, and with their Officers and Fellow-Citizens for matter of Fact, and did adjuſt theſe rates, and enacted them to be paid, they being reaſonable ones, and according to the ancient Uſage; but if they were miſtaken, it will be no cauſe for you to give Judgment againſt them for many other reaſons; As firſt, you cannot judge this to be unreaſonable. I have not heard one word ſaid that this is an unreaſonable oppreſſive Toll. Here is money levyed, what then? If it be a reaſonable ſum, 'tis not ſo great, it does not deſerve the name of Oppreſſion. I ſay 'tis not ſo great an Oppreſſion, if they ſhould have been miſtaken in the form of inſtituting the levying of it, if they might have done it under their Common Seal, and now they have done it without that by Act of Common Council. Nay, it does not deſerve that you ſhould judge it unreaſonable; you cannot do it here, for the conſiderations are meritorious and equivalent to it, the great charge they were at in Building, and they ſtill daily are at in cleanſing and repairing and providing Stalls. But however, the Caſe is not ſo diſcloſed here, that you can judicially determine this to be an unreaſonable Toll. According to the Rule in Cokes Magna Charta 222. the Toll of a Market need not be certain, only it muſt be reaſonable. And what ſhall be deemed reaſonable, the Judges muſt determine if it come judicially before them. So ſhall reaſonable Cuſtoms, and reaſonable Fines, and reaſonable Services, and reaſonable Time to remove Goods, and the like, they muſt be judged by the diſcretion of the Juſtices upon the true

state of the Case before them. Now this Case must have all its Circumstances stated and agreed by Demurrer, or found by Verdict. And so is 4 Rep. 27. b. and Hobart 135. and 174. as in the Case of Copyholders Fines, the quality and yearly value of the Land must appear, or else there cannot be Judgment whether it be reasonable or no. In the 13th Report fol. 3. & Croke Car. 196. where the Question was, Whether the Lord of a Manor might assess two years and an half value of Copyhold Lands, according to the Rack-Rents for a Fine upon Surrender and Admittance, and upon non-payment to enter for the Forfeiture; as suppose Land, if be rented at 20 l. a year, here is 50 l. demanded for admittance; there it appeared judicially that it was unreasonable, and so it was adjudged, because the value was certain. But who can here say, whether the providing of Markets cost 5 s. or 500 l. it is not estimable. Perhaps we have overbought all these Tolls that they call unreasonable; we aver it to be reasonable, the Demurrer agrees it to be so, and you must intend it to be so, unless the contrary be set forth clearly in its circumstances; for he that will have a Forfeiture, must shew the circumstances to make it out.

My Lord, Another thing is this, to answer Mr. Solicitor in that point, I say, an unreasonable By-law is no reasonable cause or colour for forfeiting a Corporation, admitting it to be unreasonable, though I grant it not. My Lord Hobart in Norris & Staps Case, Hob. 211. says, that though power to make Laws is given by special Clauses in all Incorporations, yet it is needless; for that is included by Law in the very Act of Incorporating. For as reason is given for the natural Body for the governing of it, so Bodies Corporate must have Laws as a Politick Reason to govern them. Reason is a faculty in them as 'tis in a man, and may err; and therefore says he, if the King do grant Letters Patents of Incorporation to persons, and he doth thereby make Ordinances and By-laws himself, they are subject to the same construction and rule of Law, as if they were made afterwards by the Corporation. For the King can no more make an unreasonable By-law than a Corporation; but if the King do, shall that affect the Corporation, and make the Corporation void by way of repugnancy, or an instantaneous breach of Condition? no it shall not. And therefore as they may receive unreasonable Rules from the King, without defeating of the Corporation, or having their being thereby vacated, so they may make unreasonable By-laws without the same danger of destroying the Corporation. The cases are very many wherein By-laws have been judged unreasonable; the truth of it is, there is a great misfortune in the penning and making of those By-laws; by some means or other there is something discerned that still proves an Exception to it, as we see in the Case of the Carmen and the Woodmongers; their By-law was made and re-made, and corrected

rected again and again, before it would be made to hold Water in this Court. So in the Taylors of Ipſwich's Caſe and Bradnox's Caſe, which was here lately. All theſe have been adjudged void; but what then? In all theſe Caſes it was never ſaid, hereby your Corporation is deſtroyed, you have erred in making a By-law, and therefore you have loſt your being of a Corporation. Beſides, if there were but a colour for it, and it were any thing tollerable, ſurely that were enough to make us excuſable in ſuch a matter. If it has been received as we agree it has, the Officers are Treſpaſſers, every individual of them are ſuable, and any man may bring his Action againſt them. But they that come to the Market think not fit to complain; if they did not like the Market, they would not come at all; and if they did not like the Payment, they would not come neither; and there is no levying of any thing unleſs they do come.

Now, my Lord, I will admit the levying and the receiving, and yet I ſay this is no forfeiture; for here is a miſtake of Law, or a miſtake of Fact, by colour whereof Mony is received: This by no means will work a Forfeiture of a Corporation, for at that rate every Penalty that has been levyed by a By-law will be adjudged a levying of Mony without Law, and ſo forfeit the Corporation, which has not been done in other caſes of By-laws, and thoſe much worſe than this; becauſe moſt of thoſe By-laws were made for levying Mony upon Men for exerciſing a Trade; and 'tis much more to ſay that you ſhould levy ſuch Sums of Mony upon every ſtroke of honeſt induſtry, whereby a Man gets his Livelyhood, than that you ſhall pay ſo much for your accomodation in my ground for the better vending your Goods. This hath been held good in ſome caſes, but in others it hath been held naught; and this hath all been received and levyed to the uſe of the City too, and ſo 'tis a levying of mony, whereby they have a great advantage; nay, 'tis worſe ſtill, becauſe it is impoſed by force, and recovered by force; but here 'tis a voluntary Penalty, no force, no compulſion, only the being removed from their Standings, no other Penalty, no Impriſonment, or the like; but if you do not like the conditions, you may be gone; I deſire you to walk out of this Market, if you don't like the price of the Proviſions; and to be gone from the Stall, if you don't like the price of the Standing. We were not bound to provide theſe Stalls for you, but having provided them, if you don't like them, you may leave them; but here is other caſes, the man is impriſoned, and ſued by Action for the Penalty; here at any time if you don't like you may be gone.

My Lord, I am very confident that if this be ſo, that all monies levyed by a Corporation without Law are forfeitures; or where the Law is miſtaken, then I dare boldly affirm, that we never were a Corporation two months ſince London was London, but by vertue of ſome old ſleeping By-law or other that has been ſet on foot, mo-

nies have been levyed, which perhaps will not be in strictness allowed good: And if all these had been Forfeitures, we had been in a strange condition, not one month or two should pass over us, but we had forfeited it; and never can there be perhaps a month to the end of the World, but we should still be forfeiting. And what is said of us, may be said of any other Corporation that happens to make By-laws. And I am sure in former times there were monies levyed with a witness, I mean not the late times of Rebellion only, but an hundred years ago, strange exorbitances of that nature were committed by London and other Corporations; then they went by way of Information, but never was it thought that it could affect the being of a Corporation: If it should do so, I do not know whither it will go at last. The greater or the lesser Sum is not that that will difference the Law. Is it a Forfeiture to receive 5000 l.? Why is it not a Forfeiture to receive 500? Why not to receive 5 s.? Why not to receive 5 d.? No bounds can be set for that, if it be a transgression of the Law; here is a Tort and a Wrong done by your By-law, that you have levyed 5 d. and therefore all this great Inheritance of London, this that is the greatest Inheritance of the Kingdom is forfeited for a Trifle, upon three half pence, or a Basket of Eggs.

Nay my Lord, To go further I say, if this be a Forfeiture, I say 'tis only a Forfeiture of the Market; nay, not so much neither, 'tis only a Forfeiture of the Toll: my Lord, I cannot but once more mention that excellent Notion of my Lord Hobart, That the Power of making By-Laws is included in the Act of the Corporation; for as reason, says he, is given to a natural Body to govern it, so a Politick Body must have Laws, as its reason, to govern it. Now then the making of these Laws is but the exercise of that reason, declaring the mind of the Corporation, for the direction of the Officers of it what to do and what to take; and 'tis but like the mind of a man that directs his hand what to do. For this is not like the Duty of Stallage, that relates to the Publick, and relates also to something that before they had no interest in, but only relates to the administration of a private property, and directs the manner of that administration. They are Lords of the Market, and that is casual to them, it is not necessary for them so to be. If any Corporation bid their Officers levy so much mony; suppose they bid them take more Toll than is due, or levy more mony for Rent than is due for the Land, why this might be looked upon as a great Breach of Trust and Encroachment: They should have had but 6 d. and they took 7 d. and this done by Act of Common Council, which is their way of expressing their mind; yet surely it would be no Forfeiture, because the Land is their own, and the administration of it belongs to them only in point of interest and property. Suppose a Gentleman has a Market, and his Reason, which is his By-law, as my Lord Hobart says, puts him upon taking of Toll, but he does

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a little miſtake the Law or the Cuſtom, he bids his Servant take ſo much, which perhaps may be too much for Toll, does this deſtroy his capacity of Suing and being ſued? You may as well ſay ſuch a particular perſon ſhall not plead, or be impleaded, if he do ſo and ſo. May this, if he were a Denizen, does not forfeit his Denization, and yet a Denizen is as perfectly a creature of the Kings as a Corporation is. It is Baſilicon Doron, it is the bounty and kindneſs of the King to one born out of his Dominions, to give him the capacity of a Subject, to ſue and be ſued, and the like, which cannot be forfeited, even for breach of Conditions in the Letters Patents of Denization. For this is within Verſellin Mannings Caſe, if he does not obſerve the Laws of the Land; 'tis true, he muſt be puniſhed for it, but he ſhall not be undenizen'd.

My Lord, There is a Statute which I think is a moſt plain Declaration of the Law in this Caſe, and 'tis the Stat. of Weſt' 1. ca. 31. Some call it the 30th, becauſe they differ in the numerating and heading of the Chapters. 'Tis the Statute concerning thoſe that take Outragious Tolls in Market-Towns. The Statute ſays, Le Roy prendra le Franchiſe del' March en ſa maine. The King ſhall ſeize the Franchiſe into his own Hands. My Lord Coke in his Comment upon that Statute ſays, he ſhall ſeize the Franchiſe of the Fair or Market till it be redeemed by the owner, that's all. But this is intended ſays he, upon an Office to be found; for in Statutes, all incidents ſhall be ſupplyed by intendment.

Now in the Quo Warranto that was brought againſt the Corporation of Maidenhead in Palmer's Reports, there is this very caſe. That Corporation took an outragious Toll, too much Toll, or that that was not juſtifiable, for going over their Bridge. Yet it was ſo far from being imagined that this ſhould be a forfeiture, (and yet the Caſe is the ſame, let any man diſtinguiſh it that can) that it was a Queſtion whether the Market was forfeited or no, as you may ſee in that Book, fol. 82. And there 'tis ſaid by Dodderidge, and at laſt it was agreed by all the Court, that it ſhould be a forfeiture only of the Toll, and not of the Market. And I deſire that that Folio may be noted by your Lordſhip, and that you will pleaſe to look into what is ſaid in that Caſe, for 'tis debated before, and it ſeemed as if they would have forfeited the Market by it, but not the Corporation, and yet that was not forfeited neither. And to this I will apply that rule that Mr. Solicitor himſelf did mention, Puniatur in eo quo peccat. You have offended in the Toll, therefore you ſhall ſuffer in the Toll, not in the Market, to be ſure not in the Corporation. For if it were that it ſhould affect the Market, it would be becauſe it hath ſome relation to a Market, as a Toll hath; but how can this poſſibly affect or touch the Corporation? The Statute indeed goes thus far, and ſays, Whoſoever ſhall take Outragious Toll

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shall forfeit the Market; but then shall we come and add, Whoever shall take outragious Toll, shall forfeit his capacity of holding a Market, or any thing else? Do they complain of us for taking the Legislative power upon us, and therefore we shall forfeit our Corporation, when the Statute it self has appointed the punishment, and says only, the Market shall be forfeited, and so make a new Law themselves? Statutes are supposed to be penal enough of themselves, and all penal Statutes are to be taken equitably as to the penalty, and not stretch'd beyond the Letter. And wherever a Statute inflicts a penalty, and says you shall forfeit so much, as my Lord Hobart says, the Common Law shuts up the Negative, that you shall forfeit no more. How then is it possible we should forfeit that, which if it were forfeitable at all, is not within the provision of this Law?

'Tis true as Mr. Solicitor hath said in the Book of Assizes that he cited in Vet. Nat. Brev' 161. It is said you shall forfeit in the case of a mis-user, (where the Liberties are not depending one upon another) only the Liberty that is abused, but how that can be applyed for him I understand not; for nothing can be more flat and plain against him: If so be we should forfeit our Toll or our Market, be it so; nay, if we should forfeit our Liberty of having a Common Council; what then? how is it possible to bring it up to a Forfeiture of the Corporation? You shall forfeit a Court of Pypowders, if you forfeit your Market, because 'tis incident to it, and dependent upon it, and subject to what dangers the Market it self is subject to; but the being of a Corporation, nothing can transcend that. To be sure what is incident to it, cannot transcend it; 'tis but a Subject to that which is is superiour.

For example sake, my Lord, I will cite you a Case, which is the Case of the City of London too about the measurage of Coals. It is Sir Julius Cæsar's Case, 1 Leon' 106. And I choose to cite that Book; for though it did not come out with your Lordships Authority, yet my late Lord Chancellor gave this just accompt of it, That it was one of the best of our later Reports. Sir Julius Cæsar libelled in the Admiralty against the Officer of the City for measuring Coals upon the Thames. Fleetwood came to the Bar, and prayed a Prohibition, and Edgerton the Solicitor on the other side complained, that the Mayor of London did take a Fine for this measurage, and made an Office of it; and this he conceived was Extortion (which is the thing complained of here in so many words) and being upon the Thames, should be punished in the Admiralty. As to that the Judges replyed, by no means, and Wrey & Gawdey said, if it be Extortion in the Mayor, there is no remedy for it in the Court of Admiralty, but in the Kings Courts, and it shall be redressed here in a Quo Warranto says Gawdy. 'Tis true, a Quo Warranto might well have been brought for redressing that Extortion, but it could not mean

mean thereby that the Corporation should be dissolved: And that it was so understood is most plain, for accordingly a Quo Warranto is brought. You have it in Cokes Entries fol. 535. and 536. placit' 4. And the City of London appeared and pleaded, and prescribed to it; and thereupon the Attorney General that then was, my Lord Coke himself, was satisfied, and confessed their Title, and Judgment was given for them; and since it hath been held good, and they have enjoyed it in peace; and this I hope is a good Example for Mr. Attorney to follow in this Case.

My Lord, I come now to that part which I come least willingly to, I mean that of the Petition; and that which I have to say in it, is this my Lord. First I say, That this Petition is justifiable in the Pleading, and I hope it is very justifiable; if it were but excusable, 'tis enough. That it is justifiable to Petition the King in our necessities and extremities is plain from what my Lord Hobart says, fol. 220. He says it was resolved by the Court in Reuham's Case, that it was lawful for any Subject to Petition to the King for a redress in an humble and modest manner: For as 'tis there said, Access to the Sovereign must not be shut up in case of the Subjects distresses. Now the Common Council are not less privileged than any other sure, but rather more in this kind of Addressing and Petitioning: I cannot tell what Crime to make of this, there is so much alledged against us.

I did very well observe truly, and would always observe and remember in all such Cases, what my Lord-Keeper here said to your Lordship, That Council should not so much speak, as if they would avert the Guilt of their Client, rather than advocate for their innocency.

My Lord, If the words themselves that are alledged are not words that are unlawful to be delivered or spoken, then all this that they are dressed up with of the intention to censure the King, and to bring him into dislike with his People, all that must go for nothing, and are not to weigh in the Case. Now the Words are these, That there was a Prorogation, and by means of this, there being depending so many Impeachments of Lords and others, and Bills in the Parliament in both Houses, which could not be perfected any where but there; the prosecution of the publick Justice, and the making Provisions necessary for the preservation of his Majesty and his Protestant Subjects, received an interruption. Now, my Lord, I conceive these Words are not Words that in themselves are unlawful: And for that your Lordship will be pleased to consider our Plea; I need not repeat it, you have it before you: If they are in sense and substance the same Words that have been spoken by the King, and the Lords and Commons in Parliament; he that will not be satisfied with that Authority, will not be satisfied with any. Then what do we say? We say that the prosecution of the publick Justice received an interruption;

terruption; does not the King say so, and more in his Speech we have set forth, wherein he recommends it to both Houses, that Justice may be done? What is the meaning then but this, if the further prosecution of the Offenders goes not on, Justice is not done? and so we speak but the Kings Words. We say they are not tryed, or they were not tryed, they themselves complain of it to this day; and therefore Justice did receive an interruption. I am confident, without reflection, that Honourable Person my Lord Danby in this point hath said Words much more liable to exception, though truly Words that I believe deserve no rebuke. He has complained that Justice was not done in his Case, because he was not tryed, and that when he desired to be tryed too, but his Liberty taken away, and he forfeited that which was dearer to him than Lands or Honours, his Health, whereby he endangered his Life, and lost all the comforts of Life. If it were lawful for him to say, as certainly it was, That Justice was not done in his Case, why might not the City say so? Either these Lords ought to be condemned, or they ought to be acquitted; 'tis hard to say Justice is done, when they lie so long in Prison, and are not either acquitted or condemned.

Then we say this, That the making Provision for the preservation of the Kings Person, and of his Protestant Subjects received an interruption. To this part we give this Answer: We set forth, That there were Bills depending in the Parliament for this purpose, and that is agreed to us by the Demurrer; and that these Bills could not pass into Laws, any more than the Lords could be tryed but in Parliament. Why then if so be it be so, that the matter cannot be done, nor provision made, but (as that Proclamation that issued for the Fast said, and as the Addresses of both Houses for the Fast do say) By the blessing of God upon the Counsels of King and Parliament; if these Counsels, or the King and his Parliament are interrupted, this is not done. To make such an high Crime of this I do not understand; I would not be thought to speak any thing to justifie that which is really a Crime; but this is that I say, 'Tis not in Law unlawful for us to petition the King, or address to him: But, my Lord, to take off the edge of this business, I shall beg leave to read to your Lordship a Speech of the Kings, made the 6th of March following, and therein there are these Words, The further Prosecution of the Plot.

My Lord, let any man read, and spell, and see how in substance the Words in our Petition differ from the Words of the King, making those Laws necessary for the security of himself and the Kingdom, and this spoken the 6th of March, when this very Petition now complained of was presented in January or February before, and there was no Parliament between. No man will say, that there were Laws sufficient for the security of the King

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and Kingdom, when the King himſelf ſpeaks of the neceſſity of making ſuch ones: So then, thoſe Laws that were preparing received an interruption. The Lords were not tryed, is not that an interruption of Juſtice? ſince they could be tryed no where elſe, as muſt be granted; and the King recommends it to them as not done, but neceſſary to be done. So the King ſaid before, and ſo 'tis implyed here. There is no ſuch thing ſaid in the Petition, That the King did interrupt Juſtice, and the proceedings of the Parliament; 'Tis an Inference and a Conſequence made by Wit and Art, not that the King did interrupt, or intend to interrupt Juſtice; but it ſays, by the Prorogation of the Parliament, the publick Juſtice received an Interruption.

My Lord, Suppoſe at that time there had been a Peſtilence here, and the King had been as much reſolved to meet his two Houſes as they him, but by reaſon of the Peſtilence he were neceſſitated and forced to make a Prorogation. Then there comes ſuch a Petition from the City and ſays, That by reaſon of this Prorogation, thoſe Bills that were depending did not paſs, and the publick Juſtice received an Interruption: What is the Offence of this? 'Tis all true. If there be Bills depending, and Impeachments that can no other where be tryed, they do receive interruption by a Prorogation. Can any man ſay this is falſe? The charge in the Replication is, That we did falſly and maliciouſly ſay, what? that which is true, and that which the King had ſaid before, and that which the Lords and Commons ſaid after him, That till thoſe things were done they were not ſafe; and thoſe things as yet were not done.

My Lord, There is this further in it, the Petition is ſet forth in hæc verba, and therefore I may take any thing out of it to explain it, and reſtore it to it ſelf; for this indeed is a very reſtrained conſtruction of the Petition.

It ſays, when this interruption by the Prorogation was receiv'd, That the King for urgent cauſes, and very good reaſons, did Prorogue the Parliament. It is his Prerogative to do ſo, and God forbid but he ſhould have it. I think without doubt, we ſhould be more at a loſs for want of that Prerogative than we can by the uſe of it; 'tis mine, and I believe every good mans Opinion, that that Prerogative is very neceſſary and profitable for us all; but it is the conſequence of it that this interruption of Juſtice is received; nay, we are ſo far from ſaying that the King did interrupt Juſtice, or intending it, that we ſay, we do hope the Kings gracious intentions were only to make way for the better concurrence of his Majeſty and his Parliament. The King does, for great cauſes, and beſt known to himſelf who has the Prerogative, Prorogue the Parliament; whereby as a meer conſequence, not as the Kings intention, the publick Juſtice is interrupted: May, this we affirm was with a good intention in the King, that he might

the better be inabled to concur with his Parliament, as is set forth in the Petition. Can there be any thing more properly said? 'Tis the greatest justification of the Prorogation that can be. The King has prorogued the Parliament: What to do? Why Justice hath in view received an Interruption, but not in the intention of the King. We know what the meaning of it is, and so we set forth in our very Petition, it is to gain time, that he may the better concur with his Parliament. 'Tis a great commendation of the Kings purpose, instead of charging him with Injustice, that he did resolve to concur with his Parliament for such ends, and accordingly did Prorogue the Parliament.

Now the Attorney General hath put in that it was ea Intentione; there is the sting of the business to put in those words, to make that which we may lawfully speak, of it self to be an Offence; but truly that signifies just nothing: It can never hurt a thing that is true; it has great Authority in it if it be applyed to a thing that is unlawful; but if in substance it be true, and the thing it self justifiable, those Words make nothing in the Case; and I think I need not argue that point, but refer my self to the great Case that was in Westminster-Hall, and that is the Reversal of the Judgment given in this Court against my Lord Hollis, which was a Reversal in Parliament, and is Printed, and the last Impression of Mr. Justice Coke's Reports by order of Parliament, and there they explode all the notion of ea intentione, and this business. A man speaks words that he might speak in Parliament (though I know not whether he might or no) but the great thing is, If words that in themselves are tollerable, to be spoken, be spoken, you shall not come and say they were spoken with an ill intention; though, as I shall shew by and by, this hath a kind of Fatality in it, and that is this, That it is done with an ill mind by a Corporation that hath no mind at all.

Mr. Attorney General. Just now you said it had a mind, and Reason was its mind.

Mr. Recorder. I said as my Lord Hobart says, that a By-law to it is a mind, as reason is to a man, but it hath no moral mind. My Lord, then I say, the Citizens of London were indeed at that time under great consternation, by reason of the Conspiracies that had been discovered in Parliament, and in the Courts of Justice; and it had been declared by the late Lord Chancellor at the Tryal of the Lord Stafford, which your Lordship may very well remember, That London was burnt by the Papists, and therefore 'twas no wonder that they were desirous that themselves and the Kingdom should be put into great security against those Enemies. This, my Lord, I confess is a tender point, and I would not speak a word in't without a Law-book to back me. I remember that my Lord Hobart says, That Zeal and Indignation are fervent Passions. The City of London had great Indignation against the Papists for this Conspiracy against the King and

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Kingdom, and the Religion eſtabliſhed by Law. There was no diſaffection in the City at this time when this Petition was made ſure, and I wonder that any man ſhould ſay, that knows London, and was acquainted with it then, and looks upon this Petition which paſſed nemine contradicente, that they had ſuch an intention as is inſinuated; And pray let him read the Names of the worthy Aldermen that then ſat upon the Bench, and the other Names of the Common Council-men then preſent, and then let him ſay, if, without Reflection, the King have more loyal Subjects in the City of London than theſe men were. And do you think if there had been in it any Sedition, or any of thoſe ill qualities that make up the ill Adverbs which are joyned to it in the Replication, not one of all thoſe loyally-diſpos'd men would have ſpoken againſt it? But alas, all of it paſſed nemine contradicente.

My Lord, I ſay that if the matter of it be juſtifiable, as I think it is, then all theſe words will ſignifie nothing, if there were never ſo many more of them: And the preſenting and carrying of it to the King, that is no Offence, that is not ſo much as pretended to be one. And, my Lord, I think it a very harſh Tranſlation of the word into Latin, when the Petition ſays, That the Parliaments Proceedings, or the publick Juſtice received an interruption, to put that word of Obſtructionem in; truly I think a better word might have been found to expreſs the ſoft expreſſion in the Petition; and they need not have put that hard violent word Obſtructionem, when to make Engliſh of it they tranſlated it Interruption.

But, my Lord, they do admit I ſay, That the making and preſenting of it to the King is not the Offence ſo much as the publiſhing of it, by which it is expoſed to many others beſides. Now to excuſe that, the Anſwer we give is this; and 'tis that which will carry a very reaſonable ground of Juſtification in it. Certain Citizens that were private Men had petitioned the Common Council, and thereby they were importuned to make known the deſires of the City to the King, and it was reaſonable to make known to thoſe Citizens what the Common Council had done to prevent falſe Rumours, which we knew were rife enough in thoſe days; and to ſhew that there was nothing ill in it, we did Print it. And 'tis alſo all tending at the Common Intereſt, at the Kings Safety, the Preſervation of the Church and the Government eſtabliſhed: All this they did deſire might be known to theſe Citizens, and all others that enquired about it; and therefore they Printed it, to evidence that there was nothing of ill intended in it. And I do wonder I muſt confeſs, that this Objection of the publiſhing of this Petition ſhould be ſo much inſiſted upon; for they ſay, That the Mayor, Commonalty and Citizens of the City of London did it, and ſay not any thing of the Common Council that they did Print it: Now they that did vote it, knew it without Printing; and 'tis alledged in the Pleadings,

and confessed by the Demurrer, That the Mayor, Commonalty and Citizens of London, that is, the Corporation, consists of above 50000 Men, which cannot well be intended otherwise. Why then, here is a Petition that is agreed to be well enough lodged as to the Persons that voted it, it being the liberty of the Subject to petition; and if this had been only presented to the King, though it had been by those 50000 men, nay, if it had been by 10000 men, who had been the Corporation, It had been well enough, so it had not been printed, but only kept private to themselves: Why then 'tis very strange, that what is known to all London, so great a part of the Kingdom, should be lawful, but it should be heinously unlawful to send the news of it further. It went further than the City of London, and therefore 'tis such an Offence as shall be a Forfeiture of the Corporation. My Lord, there is the Case of Lake and King, the Petition to the Parliament was scandalous in it self, yet it stood protected, being presented to the Parliament; and it was lawful to print it, provided it were delivered to a Committee of Parliament, or only to those that were Members; though 'tis said there, that the printing of it is a great publishing, for the Compolers, Correctors, and other Persons that are concerned in the Press read every Letter of it. But it was answered, That Printing is but a more expeditious way of Writing; and if he had employed 20 Clerks, it had been a greater publishing than three or four Printers. Possibly the Printers might not read it, or not be able to read it well, or not all of them read it at that time.

Now here my Lord, Sure it was lawful to acquaint the Citizens what they had done, if you take it to be the Act of the Common Council, and the Common Council to be the Representative of the City. It was always agreed by the House of Commons, that any Member might send the Votes to those that sent them thither, and whom they represented; they have blamed indeed men for sending the debates, but never for communicating the Votes: And what they may do by Writing, that they may do by Printing. Why then might not the Citizens of London, who by Custom chuse those Common Council men, well desire to know, and might well know what they had done; and then what they might do by Writing they might by Printing; for that is but another way, though a more suitable and compendious way of exhibiting any thing that you would have go to many. And if it be lawful to impart it to all the City, and all the City does know it, though it does go further 'tis no matter; for what is known to London, may very well be known to all the Nation besides without Offence, if it did go further. Besides, it shall never be intended it was published further, or that any others knew of it; for 'tis said to be published in the Parish of St. Michael Bassishaw, in the Ward of Bassishaw, and that is in London, to the Citizens of London; and so they only talked of it amongst themselves. Besides, the

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main thing I go upon, which is, if there be no ill in the thing it ſelf, the ea intentione can make no crime by a bare affirmation, which we deny; and if it might be well ſaid or done, it is lawful to Print it, and the Publication is no Offence neither.

My Lord, The next point I come to is this, That a Corporation cannot poſſibly commit a Capital Crime, or any other Crime againſt the Peace: And I ſhall offer this Dilemma, Either it was done ſeditiouſly or not; if not, then there is no ſufficient Aſſignment of a cauſe of forfeiture; if it were, then 'tis a crime, for which the Offender is indictable; and that I ſay is abſolutely impoſſible for a Corporation to be guilty of. And here I will throw in alſo that buſineſs of the Toll, and I will for argument ſake, admit the taking of a wrongful Toll to be Robbery, and then let the argument go on. I have heard it ſaid within the Bar occaſionally, that a Corporation is intruſted with the Government, and that they may commit Treaſon, and raiſe Sedition, as Mr. Solicitor hath ſaid; I ſuppoſe it muſt be under their Great Seal: But I confeſs, I believe it is rather ſpoken to amuſe than to ſatisfie; but I really think it is no ill, nor unjuſtifiable thing for me to ſay, nor againſt the Government to affirm, That 'tis impoſſible a Corporation can commit Treaſon, or that it is intruſted with the Government in any ſuch kind.

But firſt my Lord, I ſhall ſhew you what Opinion former times had, and that becauſe ſuch an Opinion as this hath been broached of late days.

Lord Chief Juſtice. Mr Recorder, Will you be much longer? Becauſe I muſt ſit here at *Niſi prius* this Afternoon, and yet I would feign hear the Argument, if it would not be too long.

Mr. *Recorder.* No my Lord, I have almoſt done, and will cut ſhort.

In 21 E. 4. fol. 13. b. 'tis ſaid by Pigott, That a Mayor has two abilities, the one to his own uſe, to take and to grant, and to do as another natural perſon does; and then the Mayor as Mayor and Commonalty, hath another Capacity to their common uſe and profit; and that is but a name, an Ens rationis, a thing that cannot be ſeen, and is no ſubſtance; and for this name or Corporation 'tis impoſſible they can do or ſuffer any wrong, as to beat or be beaten, as ſuch a Body; but the wrong is made to every member of the Body, as to his own proper perſon, and not as to the name of Corporation; nor can the Corporation do a perſonal wrong to another; nor can they commit Treaſon nor Felony as to the Corporation, nor againſt any other perſon. And if a Writ of Debt be brought againſt the Mayor and Commonalty, or other ſuch Body, upon an Obligation, and they plead it is not their Deed, and it is found their Deed, they ſhall not be impriſoned as another ſingle perſon ſhall. The ſame Law is if they are found Diſſeiſors with force, they ſhall not be impriſoned; nor

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in a Writ of Ravishment of Ward they shall neither be imprisoned nor abjure the Realm; for such a Body is but a name, to which such an act cannot be done. So says Catesby in the same Book. In a Writ brought against them no Capias shall issue, because they are but as a dead person in Law, and the Appearance upon a Capias cannot be otherwise than personal. And so to this purpose says the Chief Justice there, If this Body will do any thing, it must be done by Writing. And all along it is the Tenor of the whole Case, that a Corporation cannot commit Treason, or any other Crime. But the reason of the thing is above any Authority. Suppose that they under their Common Seal should commit Treason, and you bring an Indictment of Treason against the Mayor, Commonalty and Citizens of the City of London, what Judgment shall be given against them in their corporate capacity? What? it shall be that Suspendatur per collum Corpus politicum. And then, what execution shall be done upon that Sentence? What must they hang up the Common Seal? Nothing else you can do can affect them; but in their private capacity, there they may be punished as single persons.

A Penal Statute says, That he or she that offends against the Law shall forfeit so much, or incur such a Penalty: Is a Corporation Male or Female? that it should come under such a provision; but the real reason of the Law is this, it is a civil Being, it is Ens civile, it is Corpus politicum, it hath civil qualities, but it hath no moral qualities, and all Offences consist in the immorality of them, and there must be malice to make that immorality. No words or Acts are Treason or Felony, unless there be a traiterous mind or a felonious mind, and therefore a mad-man cannot be guilty of Treason or Felony. Serjeant brought an Action for these words, That he had spoken Treason; it was moved in Arrest of Judgment, that this cannot be Actionable; for he might speak Treason in putting a Case; ay, that were well, said they, if it could be understood so; but we must intend it that he spoke Treason, as his own words ex corde suo, which makes it Treason; for Treason consists in the immorality of the mind.

Another reason is what Pigot said, as I said before, That a Corporation is but a Name, an Ens rationis, a thing that cannot see or be seen, and indeed is no substance, nor can do or suffer wrong, nor any thing where a corporal appearance is requisite. What my Lord Dyer says in Moor 68. that he never saw, is, I believe, true in general, that no Man ever did see, that a Corporation could be bound in a Recognizance or Statute Merchant; and why? because it must be acknowledged in person: And so in this case, The Guilt follows the Person, but cannot a mere capacity. In all Crimes the Offender must appear in person, and plead in person, and suffer in person; but you can never bring the Mayor, Commonalty and Citizens into Goal, to appear and plead

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to an Indictment to receive a Judgment, or ſuffer Execution. Can a Body Politique that is inviſible appear in perſon?

Obj. But then there is this great Objection, By this means, they ſay, if there be no puniſhing of them, there is no Government, and they may commit Treaſon under the great Seal, they may raiſe Armies, and inſtigate a Rebellion, and all with impunity.

Sol. My Lord I ſay no, and I give two Anſwers to it that are not to be replyed to; and the firſt is this:

1. All theſe Perſons that are met together, though they are met corporaliter, in their corporate capacity, for the Acts of the Corporation at that time; yet when they go out of their corporate buſineſs and commit Treaſon or Felony, the Crime does not egredi perſonas, every one of them is a Traitor or a Felon; and notwithſtanding they appeared there under the pretence of a Corporation, yet they are all liable in their private ſeveral Capacities, every one of them muſt be indicted perſonally, and ſuffer perſonally: For when they go about to do ſuch a thing, 'tis out of the buſineſs of the Corporation, and they muſt anſwer for their own particular Offences. But,

2. I have another Anſwer to give to it. This Objection is to be retorted on the other ſide, That if a Corporation authorize the levying of War under their Common Seal, ſhall be affected by it in their politick Capacity, they are lyable to the Law in that Capacity only, and muſt ſuffer in that Capacity only: And the conſequence of that is, they are diſcharged in their private Capacity; and this is a Law of Indempnity and Protection for all Crimes, for a man cannot be lyable two ways for Treaſon or Felony, or any other Crimes; if he be not lyable in his private, he is in his publick Capacity; if not in his publick, he is in his private. And what is the conſequence of that? This is a Diſpenſation for a Corporation met together in a Body, to do any illegal thing, or to commit any enormous Crime; for the Kings Counſel ſays this, We are reſponſible for it in our politick Capacity; and what Execution can then be done to puniſh that Corporation with ſuch a puniſhment as the Law inflicts, that is, Impriſonment or death, any more than upon an Action of Debt brought againſt them upon a Bond, and Non eſt factum pleaded, and found for the Plaintiff, they can be impriſoned, and the like. So that this ſhall protect and ſhelter them in the commiſſion of any Capital Offence; for if they are to ſuffer for it as a Corporation, you muſt take Judgment againſt them as the Law gives it; and how will that be done againſt an inviſible Body? What will be the Execution againſt the Corpus Politicum, that can neither ſee nor be ſeen?

I think this mighty plain; and I muſt confeſs, I wonder how it could ever enter into the mind of any man, that a Corporation could commit a Corporate Crime. I have as it became me, in regard

regard of the duty of my place, and before that, for my own Learning, read Stamford's Pleas of the Crown, my Lord Cokes 4th Institutes, Poulton de Pace Regni, my Lord Hales's Pleas of the Crown, Dalton's Justice of the Peace, and other Books of that Subject, but I defie any man to shew me in any of those Treatises concerning Criminal Matters, any resolution, that ever a Corporation that could be concerned, that they should be brought before a Justice of Peace, or proceeded against upon any Law for Treason or Felony, or be hanged in their politick Capacity.

My Lord, I shall conclude all my discourse of this kind, (and I have almost done, because I perceive I encroach upon your patience, with an observation I have made upon the 19 H. 7. c. And and 'tis the Statute that makes provision against Corporations, that made By-laws against the Prerogative. That Statute says, that some Corporations did so; now an higher Offence than that, sure cannot well be described; and there that Law says, that those that do so, that make such By-laws against the Prerogative, shall forfeit for so doing for every Offence Forty pound, unless they are confirmed by the Chancellor and Treasurer, and Chief Justices, or any three of them. Now to what purpose was this Statute made; if the making of an ill By-law (and worse cannot be than a By-law against the Kings Prerogative) should be a forfeiture of the being of a Corporation? How vainly did the King and Parliament employ themselves to make a Statute that a Corporation should forfeit 40l. for such an Offence? No Man will say they had rather take that Penalty than another, when they might have a greater, if a greater could be had by Law. If they might have had a Quo Warranto, and thereby destroyed the Corporation, surely they would not have stood for the Penalty of 40 l. for they might easily have got more mony: No, they might have said, We will never pass it by, unless you will give us 4000l. or a far greater Sum; nor shall you have your Corporation again, without you give us a considerable recompense for it: And when the process and the proceedings were so expeditious and easie to come at it in a Quo Warranto, as it was easie in those days, why should they put the King to the delays in an Action of Debt for so small a Penalty as 40l.? So that I take it to be a direct Judgment of the Parliament in that Case, that no Corporation should or could be forfeited for the making of any By-Law that was irregular, though it were even against the Kings Prerogative.

But to hasten to a conclusion, I have all this while, my Lord, supposed, that the Mayor, Commonalty and Citizens of London have done this, but it is not so; this is not the Act of the Mayor, Commonalty and Citizens, 'tis not the two hundreth part of the Corporation, 'tis but the Act of the Common Council; and we have distinguished our selves by pleading, that it does not consist

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of above 250, when the City contains above 50000. I muſt confeſs the Council is not taken notice of much in Law; as is ſeen in Warren's Caſe, 2 Crook 540. & 2 Rolls 112. Warren being one of the Common Council of Coventry, and diſplaced, ſued out a Writ of Reſtitution, and upon that Writ it was returned, that by cuſtom the City might place and diſplace ad libitum; they there held that the cuſtom was good: But it is not ſo of a Freeman or Alderman, becauſe he hath a Freehold; but a Common Council is a thing collateral to a Corporation, and the Office of a Common Council is nothing but only to give aſſiſtance and advice, which they may refuſe at their pleaſure. In Eſtwick's Caſe in Style 32. & 2 Rolls 456. it is ſaid, That 'tis a place meerly by cuſtom, and that the Common Council is properly but only a Court of Advice; and, my Lord, you ſhall never intend more than that they were a Court of advice: All the riſe of their Power is but by cuſtom, and that cuſtom is pleaded to give advice for the benefit of the City, and make By-laws for the good of the Corporation, and that is confeſſed by the Demurrer, and you ſhall intend no more than what is opened in the pleading.

And then 'tis evident this was done by a very ſmall part of the Citizens of London, and that does no way affect the whole Corporation ſure. In James Baggs Caſe, 1 Rolls, fol 226. it is ſaid, That if a Patent be procured by ſome perſons of a Corporation, and the greater part do not aſſent to it, that ſhall not bind a Corporation. And if ſo be a Charter ſealed, and ſent by the King, becauſe not accepted in pais, by the greater party, bind not, Shall an Act done by a few, and an Act done that tends to a Forfeiture, bind the whole in point of their being? There is no ground to ſay, that the Common Council repreſents the City, no more than a Counſil does his Client, or an Attorney his Maſter; only as far as is for the benefit of the City, they are choſen and entruſted to make By-laws; if they offend, they are but Miniſters and Officers, and ſo they are within the Statute of Ed. 3. which I mention, though I think we have no need of that in the caſe to help us; if they make an unreaſonable By-law, 'tis void, and every man that is aggrieved by it may have his Remedy, may bring his Action. Shall you ſupply this by an intendment, that they have ſuch a relation? That they are the Repreſentatives of the City of London? That they have a power to forfeit the Corporation? No, my Lord, by Law they are part of the Corporation, but they have no ſuch power to forfeit the Corporation. A cuſtom ſhall never be conſtrued to enable a man to do a wrong; and a great wrong it is, that they that are truſted, and truſted but for a year, and truſted but for the good of the Corporation, of which they are part, ſhould give up the being, or what is worſe, forfeit the being of that Corporation. The cuſtom of Kent that makes an Infant capable of making a Feoffment, ſhall never inable an Infant Tenant in Tayl, to make a Feoffment, ſo as to work a diſcontinu-

ance of the Estate Tayl, and put the Heir to his Formedon. Every illegal Act of theirs is beyond their Commission, and a nullity of that is all in respect of themselves; and 'tis as if they the had never done it as to the Corporation, for they are by no means the Corporation; for tho' they use the Comm Seal in some cases at some times; so do the Court of Aldermen in other cases; but it is only in other cases wherein they are particularly intrusted. If an Act of Common Council say, that I shall have such and such Lands of the Cities, that Act signifies nothing but as a direction and advise; when 'tis under the Common Seal, 'tis an Act of Corporation, and preceding by advice of Common Council, it binds.

Now, my Lord, this is the more unreasonable, because we know that the practice of the Common Council in London, being to advise for all the Inhabitants, they are chosen by the unfreemen as well as others; and 'tis a strange thing that they should have a capacity to give away the liberty of the Citizens, when they are chosen by others as well as them; they had no such trust for them; nay, all trust they had was to keep their Liberties, and not to destroy them. Has any Man a trust to destroy himself? sure no Man is trusted by God himself to be felo de se. And certainly then you can never understand it to be in the nature of a Trust to destroy another; and the least Citizen, my Lord, has as much and as true an interest in the Corporation of the City of London, as the greatest: And therefore 250, if they had been much the greater number of the Citizens, would signifie nothing to the rest of the Body.

My Lord, I shall only say this little more, here is no crime charged relating to them as a Corporation: Here is indeed a fine word used, that we did this contra fiduciam in corpore politico repositam, but all this is but an imaginary Trust, the King never gave them a power or authority, or entrusted them to make By-laws that were unreasonable; he gave them a power to make reasonable By-laws, and so he does every Corporation. And the same Law that gave them the power, limits that power, and says, if they go beyond that power, 'tis a nullity. And these Acts relate not to them as a Corporation; the Petition is not so much as said to be against any trust reposed in the Corporation, certainly there never was any such Trust. Did ever the King entrust them to advise him about the matters contained in the Petition? and if not, then 'tis not contra fiduciam; therefore it relates to particular persons: If it be an Offence, I hope 'tis none of the Corporations.

But then the levying of Mony, that is contra fiduciam; they took upon them an illegal and unjust power in the Common Council

Council. Suppoſe it ſo, how does this belong to the Corporation? 'tis an encroachment upon property, 'tis the moſt arbitrary thing in the world. Whether they have the Market, and the Dominion of it or not, is matter of Fact, and being pleaded, is confeſſed by the Demurrer: And then for the power of making By-laws, that is a thing that cannot poſſibly be taken from them while they are a Corporation; 'tis that which muſt be in them as a Corporation, like the faculty of Reaſon in a Man to expreſs his Reſolutions by. And 'tis no more, than if a man that has a Market, bid his Servant go and remove ſuch as have Stalls there, unleſs they will pay ſo much. That direction is as good a Law as this, and as bad a Law as this, and no more. There is nothing elſe in it but the direction of the Officers, what they ſhall do in the ordering of the Markets, and diſpoſing of the Cities Property.

Then as to the former method of expreſſing themſelves, whether it be by Act of Common Council, or under the Common Seal, or by their natural Voice, 'tis all one, 'tis not a thing that concerns them as a Body Politique: But if it were illegal and miſtaken, I ſay, the Penalty is only, that it ſhall be void. What the Common Council, nay what the Corporation does within the limits of its Authority is good, what beyond that it does, is void. If I command my Servant to diſtrain for Rent, and he kills a Man in the doing of it, this, as to me, is void; but as to himſelf, that is chargeable upon him. And what I ſay of the Common Council, I ſay of the Corporation it ſelf, That it is a Capacity, and a limited Capacity; 'tis the act of the Members, not of the Corporation, if they do wrong. The Common Council can act for the good of the City, and the City can do no more, if they themſelves ſhould meet, Crooke, Eliz. fol. 85. The Queen makes a Leaſe for years of Lands to the men of Cheſterfield, by the name of Aldermen, and they by that name grant all their Intereſt to Clerk; ſays that Book, this is void; for the Queen granting them a Leaſe as to the Aldermen of Cheſterfield, this makes them a Corporation, and gives them a capacity to take, but not to grant. And ſo Rolls Abr. 1 p. 513. And therefore no Corporation is to be conſidered as a Corporation, but only when it acts according to the capacity allowed to it; and as to the reſt, it all turns into their private capacity, but it affects not the Body, nor hath any ſuch relation as to bind it.

My Lord, All the Queſtion here is, Whether there ſhall be ſuch a Perſon in Eſſe as this Corporation? Whether the City of London ſhall ſubſiſt as ſuch a Perſon, to ſue and be ſued, to plead and be impleaded? There is nothing of Government or Miſgovernment in the caſe, but 'tis all about our Capacity,

and nothing else, whether we shall be Defendant or Plaintiff in any Court.

My Lord, Magna Charta and all the other Acts that have gone in confirmation of it, shew the great care of the Government in all Ages to preserve the City of London, and I look upon them as so many Declarations of the immortality of it, and all other Corporations. I shall use a strange Argument perhaps at first hearing, but 'tis to me a great Evidence for us, that Magna Charta does not confirm our being, but our Liberties and Priviledges; it says, That the City of London shall have all its Liberties, it confirms its Leets, its Markets, and all those things, that is, it confirms all that it has; it has not saved indeed, if a Corporation indeed be built upon a Corporation; but that particular Liberty may be destroyed, as that of Bridewel, and the like, but it does more than confirm its being, for it does implicitly declare, That that was impossible to be forfeited: They confirm what needed confirmation; but for their being there was no need of that, it only confirmed the supervenient Liberties, without which it might be a Corporation; but as to its being, it medled not with that: And if it were not so, it were an unreasonable thing that we should have so many Acts of Parliament that give such particular Powers to the Mayor and Commonalty of London; and scarce any Act of Parliament that relates to the Publick, but London is mentioned, and taken care of in it. Are not all these Declarations that London should stand for ever? Would not any one have said else, Pray what do you put such confidence in London for? There is not such a fickle thing upon the Earth as the being of the Corporation of London. If they lay but 6 d. upon a Joynt of Meat they are gone, and there is not a month in the year but they forfeit their being.

The Act for Administration hath a Proviso, that says it shall not extend to London: Why does any Man think that this Law was not intended to be as perpetual for London, as for other parts of the Kingdom? They did not question but London would be a Corporation as long as England was England.

It would be a strange thing in the Example of it, that the World should be taught by one instance, that a Corporation can be ruined, when so many People put their Trusts in those Corporations, and so many vast Inheritances depend upon them. And I think the King and the Government, or those you call so, are more concerned to preserve London, than all the Persons that are in it. I would not speak it in this place by way of Argument for my Client, but I think I could maintain it in all places; only I hope and believe I shall have no need for it.

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My Lord, All Innovations, as this muſt certainly be a very great one, are dangerous: This Frame of Government hath laſted and been preſerved for many hundreds of years, and I hope will do ſo as long as the World laſts. My Lord, I need your Patience, but I have juſt done. Here is a Charge that is very little indeed, there is nothing in the matter of it, but the great conſequences are fitter to be meditated on than ſpoken of. And therefore for theſe Reaſons I do pray, That theſe Liberties may be adjudged to us, and we may be diſmiſſed out of this Court.

Ter-

Termino Paschæ next ensuing.

Mr. Justice *Dolben* being discharged the beginning of the Term, and Sir *Francis Withens* in his place.

Sir *Robert Sawyer* Attorney General, for the KING.

I. THIS Information is not brought for the taking away or destroying the Corporation; for tho it be true that there be in it the words, Et penitus excludatur, yet that is but form; the intention is only to prune and take away the Excesses and Abuses, and therefore no danger of falling into such inconveniences, as suggested on the other side.

In Rolls Abr. Tit. Prerog. 204. It appears by Petitions in Parliament, that London and Norwich, and other Cities, have had their Liberties seized into the Kings hands for some abuses and miscarriages in the Cities, and sometimes restitution granted, other times refused, and answered, that they were in good condition.

These Petitions were 13. & 18. E. 1.

The Liberties of the City are not intended to be destroyed, but preserved and maintained, and this Suit designed to that end.

II. That this Information brought against the Corporation by the name of Mayor and Commonalty and Citizens, is good and well brought.

What is alledged against it out of my Lord Chief Justice Hales his Book, is not any opinion, but a Nota upon the Case of Cusack.

And

And in the Caſe of Cuſack, the Judgment is againſt the particular perſons named, & alios Cives, although not named. But further,

It is not neceſſarily intended, that though they are ſued by the name of Mayor and Commonalty and Citizens, that they are ſued as a Corporation or Body Politique. For by thoſe words, [the Citizens and Inhabitants] are comprehended and expreſſed; and an Information lies well againſt Inhabitants or Citizens, without naming any perſons by particular name; and there are divers Preſidents of Quo Warranto's ſo brought.

Mich. 27. Eliz. C. Entries 537. Quo Warranto contra Inhabitantes Burgi de Denbeigh, Quo Warranto they claim a Court of Record, and other Priviledges.

Mich. 15. Car. I. Quo Warranto againſt the Corporation of Chard. By 2 Car. I. the like name of the Corporation againſt Canterbury. But 'tis true, that in theſe Caſes are no procedings to Judgment.

But Trin. 6. Jac. Quo Warranto againſt the Corporation of New Malton, and thereupon Judgment is given againſt the Corporation.

III. Next that the Replication alledging Forfeiture is not repugnant to the Information; for though the Forfeiture ſhould determine the Franchiſe, yet it remains not veſted in the King until the Forfeiture appears upon Record by Office or Inquiſition finding it, or by Judgment upon Information; and therefore this Information well brought againſt the Corporation.

IV. That a Corporation or Body Politick may be forfeited, is beyond all doubt.

A Corporation is a viſible Body of Men, and every of the Members thereof hath a Freehold in it.

Sir James Baggs Caſe, Co. Rep. 11.

Co. Rep. 10. 14. That all their Acts are performed by natural Perſons: That all Corporations derive their Commencement from the Kings Grants.

49 E. 3. 3.

Br. Corporation 34. And are erected for better Government, either of perſons inhabiting within ſuch a Townſhip or place, or that are of ſuch a Trade or Myſtery.

1 Inſt. And the Books cited to prove that it is a Capacity, do not prove it not to be a Franchiſe or Liberty.

But on the contrary, all Books that ſpeak of it agree it to be a Franchiſe, Priviledge and Liberty which the Perſons incorporate have by the name of their Corporation.

If

If then a Franchise or Liberty, then nothing more common and certain, That Franchises or Liberties abused, are thereby forfeited.

1 Inst. 9.

21 E. 4. 13.

Co. 10 Rep. Sutton's Hospital Case.

That Corporations have been Dissolv'd.

1 Inst. 13.

2 Inst. 431, 432.

Co. 3 Rep. Dean and Chapt. de Norwich's Case.

That Corporations may be surrendred is plain, from the Cases of Heyward and Fulcher, Jones.

Palm. 506.

That the Causes for which Franchises may be seized, are the same for which they are forfeit, as for Non-user or Abuser.

And therefore Forfeiture and Seizure alike.

For Contempt of the King, the Court may seize the Liberties of a Town.

2 E. 4. 5. Case de Bayliffs de Reading.

15 E. 4. 6. Seizure of Liberties for not Appearance, and if not replevyed the same Eyre they are forfeit. This shews that the same default that gives Seizure gives Forfeiture.

A Seizure by award of a Court before Judgment is but quousque, and the Court may restore; but a Seizure after Judgment is final, and the Court then cannot grant Restitution.

5 E. 4. 7. Where the Liberty is usurp'd and gain'd by Tort, there the Judgment must be an Ouster.

But otherwise where the Liberty was once of right, but forfeited by Abuser; there the King shall have it.

Case de New Malton, Judgment there was only a Seizure.

Case de Cusack. Judgment fuit penitus excludatur, because usurp'd and no title.

By the Seizure the King is in the possession. Sir G. Reynel's Case, Co. Rep. And the Corporation cannot act during such Seizure; for they have not their Mayor or Officers by which they can act; and that is the reason they Petition to be restored in E. 1. ad pristinum Statum.

Rolls Abridgment, Prerog. 204. 2 E. 4. 27.

1 Institutes 253.

15 H. 3. Rot. Cl. Memb. 2. Village of Hereford seized into the Kings hands quousq; &c.

By

By the Seizure the Corporation est Civiliter mortua, and cannot act.

Corporations are instituted for a particular end, viz. For good Government and Order. They are as an Office erected, and the Actors Officers to that purpose.

All Offices have a Condition in Law incident to them, to be forfeited for abuser or mal-user.

Co. Rep. 8. 44. Co. Rep. 9. Earl of Shrewsburies Case.

And by the same Law Corporations forfeit for mal-user or abuser.

No difference betwixt Corporations aggregate or sole, and the one forfeit for the same mis-user or abuser as the other. And as to the Mischiefs that will ensue if the Law otherwise,

It is no answer, That the persons offending may be punished in their private Capacity.

For if they still remain a Corporation, they may Assemble, Consult, raise Mony and Men, to the hazard and danger of the King and his Government, and still continue a form'd Body, too much thereby advantaged to serve such purpose.

Presidents and Cases of Forfeiture.

Case of Sandwich, Pasch. 3 E. 1. Rot. 55. upon an Information, the Judgment was, Consideratum fuit per Dominum Regem & Consilium Domini Regis in Parliamento, quod Majoritas & Libertas de Sandwich capiatur in Manus Regis.

Villa de Cambridge, Inst. 4. 428. M. 8 R. 2. Plea to the Jurisdiction rejected, and Judgment that their Liberties shall be seized.

Ryly placita Parliamenti 277. Judgment that the Liberties of Winchester shall be seized quousq; and restored again.

Mich. 18 E. 3. Rot. 162. in B. R. Judgment against Ipswich, that the Custody thereof shall be seized.

2 Rolls Prerog. 204. divers Seizures: 1 Crook 252. it is there cited, that the Liberties of the Town of Norwich were seized 27 H. 6. for not suppressing a riotous Assembly there.

F. Avowry 129. Iter of Lancaster, Quo Warranto against Northampton, Judgment of Seizure quousq; &c. for mis-pleading, 2 H. 7. fol. 11.

Mich. 15 Car. 1. B. R. Quo Warranto against the Town of Berkhamsted, but no Judgment entred.

Usual Proceedings in Eyre, to Seize, Fine, and Restore.

Rast. Entries 540. Seizure of a Leet for not having a Tumbrell.

And all the several Cases, and the very Acts cited that prove Seizures of a Corporation, prove also that they may forfeit.

V. That the Acts of the Common Council are the Acts of the Corporation.

Corporations have by their Charters Prescription or Custom, Common Councils to assemble, advise and consent; they are as Delegates for the rest of the Body; they are the Active Corporation, they make By-laws, and dispose of the Lands and Concerns of the Corporation; in them the Corporation acts; 9 H. 6. 3.

6 E. 3. 5 H. 7. 16. 48 E. 3. 17. 1 Cr. 548. Warren's Case, Rolls 2 Abr 456. Tit. Restitution.

Obj. That the Stat. 1 E. 3. insisted on by the other side, whereby they would have it, that the Liberties of the City should not be seized for any the Miscarriage of the Officers.

Resp. In answer to this Objection,

I. It is no Statute, but only a Charter, and that Charter not granted to the Mayor, Aldermen, and Commonalty, but only Civibus London.

II. That it extends not to this Case; for by the words, [Officers and Ministers] the Mayor, Sheriffs and Aldermen (being ordinary Officers of the City, by whom the Kings Writs and Precepts are executed) are the Persons intended. But this extends not to the Mayor, Aldermen and Common Council, which are the visible and active Corporation.

Stat. 38 E. 3. c. 10. explains this to be so, for that is expels, Mayor, Aldermen and Sheriffs; and that the Liberties of the City shall not be seized for their miscarriage till their third Default.

But the Stat. 1 H. 4. c. 13. repeals the former Stat. of 28 E. 3. also the Stat. 1 E. 3. if it were any, puts the City of London into the same condition with other Cities.

VI. That the Facts and Crimes charged in the Replication are Forfeitures.

They are Offences of a high Nature. To oppress the Subject by railing Money for their own private Gain, is quite contrary to the ends of their being a Corporation, which is the good Government and Preservation of the Subject; but to make use of this Power to oppress and raise Money for private benefit, is a great Abuse of their Authority and Franchise.

And they cannot excuse themselves as for a Toll: For Toll cannot be claimed, except it be a Sum certain; it must be some little petit Sum claimed for Toll. These Sums are too great and unreasonable to be claimed for Toll.

The Statute of H. 7. that gives a Forfeiture of 40 l. for using an unlawful By-law, did not alter the Law that was before. It gives a new and further Penalty, but takes not away the old.

And as to the Custom alledged for ascertaining Tolls, Duties, or Sums reasonable to be paid, such Custom is unreasonable for the Uncertainty and the Nature of it.

VI. The Petition is malicious, and apparently Seditious, stirring up the People to a dislike of the King and his Government.

Stat. 2 E. 6. c. 1. provides against derogating from, or depraving the Book of Common Prayer.

1 Cr. 949. Sir William Markham versus Budges, against Scandalizing a Justice of Peace.

Much more is it to deprave, Libel, or Scandal the King or his Government. And for these great Crimes committed by the City I pray Judgment against them.

Mr.

Mr. *Pollexfen*, upon another day for the City, his Argument.

IN this Caſe, when I conſider the greatneſs and conſequence of it, That it affects the King, the Parliament, the Laws, the very Government under which we have lived, this great City of London, and all other Corporations and People of England, and their Poſterities, for ever. I cannot but be troubled that I ſhould be the Man to whoſe Lot it ſhould fall to argue it; but that which comforts me is, that your Lordſhip and the Court, upon whom the Judgment of this great Caſe depends, will help out my Defects, and according to what is required in the great Places you bear, take care and provide, that by your Judgment the ancient Government and Laws of this Kingdom receive no Damage or Alteration.

The King's Counſel have on their ſide only ſome general words out of old Records of Forfeitures and Seiſures of Liberties, which are of uncertain and doubtfull ſenſe; but there is not on their ſide produced any one Precedent, Judgment, or Opinion, to maintain the point in queſtion, viz. That a Corporation, or Body Politick, ever was determined, or diſſolved, or taken away for a Forfeiture. No, not in the maddeſt of Times, in the Times of Edward the 2d. and Richard the 2d. when the Tumults and Diſorders were ſo great, that they not only ſeized and took away Liberties and Franchiſes, but the Lives of Princes, Nobles, Judges, Lawyers, and all that ſtood in their way: In thoſe times, though they have hunted and ſearched with all diligence, not one inſtance of a Corporation taken away, or diſſolved by a Forfeiture is cited. So that from hence I hope I may ſafely conclude, that I argue in this caſe for the old and known Laws, as they have been ever practiſed through all Ages, and againſt that which never hath been practized or known, which is a great Encouragement to me.

The Pleadings being very long, I ſhall only repeat ſo much of them as I uſe, when I come in order to ſpeak of them.

I. The firſt thing proper to be ſpoken to is the Information it ſelf, and therein I make this Queſtion:

Whether as to that part thereof that chargeth the Corporation with uſurping upon themſelves the being of a Corporation, whether that be properly brought againſt the Body Politick, as this is, or ought to have been brought againſt the particular Perſons?

I do agree, that as to the other things mentioned in the Information, the having Sheriffs, Justices, &c. The Information is properly brought against the Corporation: And I do also agree, that it may be good as to those things, though bad and insufficient as to the charging the Corporation with Usurpation of their Being, without lawfull Warrant or Authority. And that I may come singly to this Question, I do put out all the other Franchises in the Information, and take only what concerns this point, and then the Information, as to this point, chargeth,

> That the Mayor, Commonalty, and Citizens of *London*, by the space of a Month last past before the Information, did use, and claim to have and use, without any Warrant or Regal Concession within the City of *London*, the Liberty and Franchise following, *viz.* to be a Body Politick *Re, Facto, & Nomine*, by name of Mayor, and Commonalty, and Citizens, and by that Name to plead and be impleaded; which Liberty, Privilege, and Franchise, the same Mayor, Commonalty, and Citizens, upon the King by the time aforesaid have and yet do usurp.

This is the Substance of the Information as to this point; and,

Whether this Information thus brought, as to this matter, be sufficient in the Law, upon which a Judgment can be given, or ought to have been brought against particular Persons, is the Question.

I conceive it ought to have been brought against particular Persons, and is insufficient as it is, and that no Judgment can be given upon it, supposing the Defendants had demurred, or pleaded nothing to it.

To make out the Insufficiencies, I desire to consider what it imports:

1. The very bringing the Writ, and exhibiting the Information against the Corporation, imports and admits the Mayor, Commonalty, and Citizens, to be a Body Politick, capable to be sued and impleaded, respondere, & responderi, otherwise there is no Defendant, no Person in Court, against whom the Suit is brought. It is not enough that the Person sued be a Person by supposition, or a pretended Person, but none in reality. If a Writ or Information be brought against a Baron and Feme, this must admit that they are Baron and Feme really and truly; and if there be any thing after in the Writ or Information, that shews that they are not truly and really Baron and Feme, but that they do wrongfully and unduly take upon them to be Baron and Feme, when in truth they are not, this would be contrariant and repugnant, and abate the Writ or Information. The like is supposed by the bringing the Writ or Information against the Body Politick; it supposeth and affirmeth them really and truly to be such,

ſuch, and the ſubſequent Affirmation that they uſurped, ſo to be, and are not ſo really, is contrariant and repugnant.

2. When in the Information it is alleadged, that the Mayor, Commonalty, and Citizens, the Liberty, Privilege, and Franchiſe of being a Body Politick Re, Facto, & Nomine, and to be ſued and impleaded, upon the King have and yet do uſurp.

To uſurp or doe any Act of Neceſſity, imports and admits a precedent exiſtence of the Perſon that doth uſurp, or do the Act, to the Act done. Particular Perſons may uſurp, and take upon themſelves that which they have no right unto: The Perſons that doe the Act did before exiſt, and had a Being. And when a Corporation is ſaid to uſurp, it of neceſſity muſt be ſuppoſed to have a precedent Being. The ſenſe of Uſurpation in a Quo Warranto, is the Subject's taking upon him Franchiſes without Warrant.

By Lord Coke ſaith, That Uſurpation in the Common Law hath two ſignifications: Inſt. 1. 277. b

1. The one when a Stranger preſents to a Benefice, and his Clerk inſtituted and inducted, he gains the Advowſon by Uſurpation.

2. The other when any Subject without lawfull Warrant doth uſe any Royal Franchiſes, he is ſaid then to uſurp upon the King.

So that an Uſurpation ſuppoſeth of neceſſity a Subject or a Perſon precedently in eſſe, that uſeth the Franchiſe, or that doth uſurp. That which is not in eſſe, that hath no exiſtence, cannot uſe any Franchiſe, cannot uſurp. The very alleadging that they uſurp, doth admit of neceſſity an Exiſtence precedent in the Corporation, ſuch as can uſurp, or Act, and therefore this Information is inconſiſtent with it ſelf.

3. But another reaſon to prove that it ought to be againſt particular Perſons, and cannot be againſt the Body Politick, is drawn from the Judgment that muſt be given upon this Information, if Judgment for the King. The Judgment muſt have two things in it.

1. To damn the Corporation, Quod penitus extinguatur & excludatur from being a Corporation for the future; for being wrongfully uſurped, it cannot be continued: A Judgment to continue Wrong and Uſurpation can never be a right Judgment.

2. A Fine to the King for the uſurping it for the time paſt.

This Judgment may and ought to be given, where the Information is againſt particular Perſons, for uſurping upon themſelves to be a Corporation, and they ſhall be fined and impriſoned; but this cannot be where the Information is againſt the Body Politick; for by the Judgment the Body Politick is extinguiſhed and diſſolved, and no Fine can be impoſed upon that which is not: So that hereby the King muſt loſe his Fine, which the particular Perſons uſurping ought to pay, and the Law is agreeable always to it ſelf, and the means anſwerable to the end. I

suppose no man will affirm, that where a Suit or Judgment is against a Corporation, that the Fine or Execution shall be against all, or any particular Member.

For the Precedents and Authorities in this point,

1. I do agree, that there be Precedents in the Crown Office of Quo Warranto's brought against Corporations in such manner as this is brought, for usurping to be a Corporation, and to claim divers other Liberties.

P. 2 El. r. 1. Quo Warranto against the Bailiffs and Burgesses of Stratford, for claiming to be a Corporation, and to have divers Liberties and Franchises, thereupon a Plea put in, and a confession of their Claim by the King's Attorney.

M. 3 & 4 El. r. 4. The like against the Corporation of Reading, the like Plea and confession, the very next Term after the Information filed.

H. 14 Jac. r. 37. Against the Corporation of Horsham, a Plea and confesson by the Attorney.

H. 19 Jac. r. 26. The like against the Corporation of Dover, but nothing done upon it besides Plea put in.

H. 20 Jac. The like against Bath, a Claim put in, and confessed.

H. 20 Jac. r. 58. The like against Brackley, and a Noli prosequi.

T. 3 C. 1. r. 22. The like against Baston, a Claim put in, and confessed.

T. 2 C. 1. r. 47. The like against New Sarum, Imparlance, and nothing more upon it.

T. 6 Car. 1. r. 43. The like against Bridgport, Claim and Confession.

M. 2 C. 1. r. 36. The like against Biddeford, a Claim and Noli prosequi.

M. 8 C. 1. r. 42. The like against Witcomb; they plead themselves a Corporation by another Name, and traverse the Name in the Information; nothing more on the Roll.

And it is probable there may be more like these, but if of any authority, they are for me, and not against me.

1. For that they all being for claiming other Liberties, as well as to be a Corporation, and being good and sufficient as to the other Liberties and Privileges that the Corporation claims; though insufficient for this of claiming to be a Corporation, they must be proceeded upon, if the Attorney pleaseth.

But is any to be found where only the claiming to be a Body Politick, and nothing else; or if other things questioned, yet only proceeded in as to this particular of claiming to be a Body Politick, as in this Case? That will be like.

2. In all these nothing is done; a Claim or Plea put in, and that confessed, or Non prosl. or not proceeded upon to Judgment. Perhaps not proceeded in because insufficient, and so are Authorities

rities for me: For there being ſo many of theſe, which are either Non proſſ. or not proceeded in, perhaps the Reaſon might be, becauſe inſufficient in the Law, as to the Corporation, and ſo are Authorities for me in this Caſe. But one there is found,

Quo Warranto verſ. Bailiffs and Burgeſſes of New Malton in Yorkſhire; Quo Warranto they claim divers Liberties, as Courts, Markets, and others, and amongſt the reſt, to be a Body Politick. They put in a Plea, and make their Claim by Preſcription; Iſſue's joined, and tried by Niſi prius at York and found againſt the Corporation, and a Judgment entred, T. 6 Jac. r. 3.

Quod Libertat' & Franchesii predict' in manus Domini Regis capiantur & ſeiſiantur, & quod Ballivi & Burgenſes capiant' ad ſatisfaciend' Dom' Reg' pro Fine ſuo pro Uſurpacion' Libertat' & Franchesii predict'

There is no mention of this Caſe in any Book or Report as far as I can learn; ſo that this paſſed ſub ſilentio.

Next, How can this Judgment be good?

1. How can that be a right and lawfull Judgment, which ſhall be given for the continuing a thing that is by the very Judgment adjudged to be unlawfully uſurped, and a Fine for it, it is directly oppoſitum in Objecto.

2. How can the Corporation be ſeized into the King's hands? Extinguatur & excludatur is proper; the Corporation cannot be in the King.

3. How could the Bailiffs and Burgeſſes be fined, when they were baniſhed and gone there is no Corporation in being; that which is laid upon a Corporation cannot be levied upon the particular Members.

I have made enquiry after this Borough of New Malton; it is a ſmall Borough, within the Manour of the Anceſtours of my Lord Eure; it did anciently ſend Burgeſſes to Parliament, but from the time of King Ed. 1. to the beginning of the Long Parliament 1640. it ſent none then; upon Petition a Writ ordered, and they then and ever ſince have choſen Burgeſſes; my Lord Eure being Lord of the Manour, and offended with them, did proſecute this Quo Warranto, and they having neither Lands, Revenues, or Eſtates to defend themſelves, he eaſily prevailed, they never in truth being incorporate, nor having any Charter. But that which I give for anſwer to theſe Precedents is,

1. They are all, where not only the being of the Corporation, but alſo divers other Liberties were in queſtion; ſo that the Informations were good in part, and not worth the while to queſtion whether good, as to that part of their being a Corporation. The Fine upon them for uſurping the other Liberties, would have been more than they could bear or pay.

2. That this is but one Judgment, and in a caſe of a ſmall Borough, and that Judgment, as entred, not agreeable, but inconſiſtent with the Rules of Law or Reaſon. The Body Politick

tick could not be ſeiſed into the King's Hands, but whenever a Judgment is given for the King, for a Liberty which is uſurped, or extinct in the Crown. The Judgment muſt be quod extinguatur, and that the Perſon that claimed them deinceps Libertat' & Francheſiis predict' nullatenus intromittat', ſed ab uſu earund' a modo omnino ceſſat quodque, the Perſon that uſed them pro uſurpacion' Libertat' & Franch. predict' ſuper Dominum Regem capiat' ad reſpondendum dict' Dom' Reg' de Fine ſuo pro Uſurpatione Libertat. & Franch. predict'. That this is the Form, C. En. 559. a 537. 527. b

3. That this Judgment of New Malton paſſed ſub ſilentio, for there is no mention of it in any Book, nor doth it appear that ever the Queſtion was moved or debated. And for Precedents in matters of Practice and Proceſs, they are of Authority; but in point of Law, unleſs they have been upon Debate, are of little authority to prove what the Law is. Rep. 4. 94. Slade's Caſe, L. 5. E. 4. 110.

But on the contrary, all the Precedents that are in any printed Books of Informations, where brought to queſtion, whether Body Politick, or not, are againſt particular Perſons by name:

C. En. 527. Againſt Chriſtopher Helden, and others.

Pal. 9. fo. Quo Warranto againſt Cuſack, and others.

Rol. 2. r. 113, 115. Quo Warranto againſt the Virginia Company

Rol. 2. 455. was brought againſt Nic' Farder, and others, Quo Warranto they claimed to be a Corporation?

Some of them pleaded inſufficiently, upon which there was a Demurr, and a Queſtion, How the Judgment ſhould be entred? for that the Maſter and chief of the Company were left out of the Quo Warranto.

By which it appears, that it ought to be brought againſt the Maſter, and particular Members, by Name.

Next for the expreſs Authorities in this Caſe, to prove it cannot be againſt the Corporation.

Rol. Rep. 2. 15. is expreſs, That if a Quo Warranto be brought to diſſolve a Corporation, the Writ ought to be brought againſt the particular Perſons, for the Writ ſuppoſeth that it is no Corporation.

The difference there taken; when the Attorney General ſuppoſeth the Defendant to be a Corporation, otherwiſe when he queſtions them as Inhabitants of a Vill. then they ought to enable themſelves, they muſt then ſhew themſelves a Corporation, alſo prove it.

Fol. 168. My Lord Hales, in his Common-Place Book in Lincolns-Inn Library, ſaith thus:

Nota, &c. Quo Warranto ſoit port pur uſurper de un Corporation ſerra port verſ. particular Perſons, quia in diſaffirmance del Corporation, & Judgment ſerra done que ſerra ouſte; mes ſi le quo Warranto ſoil port pur Liberties claim per Corporation, ſerra port verſ. le Corporation.

This

This is poſitive.

This, if it were only my Lord Hales's Judgment, were of no little Authority, but I think it is a Report taken upon the Caſe of the Quo Warranto againſt Cuſack, and others.

But Mr. Attorney finding, as I believe, that all the Precedents to be againſt him. For in them all there are either non Proſſ. or no Procedings to Judgment, the Cauſes whereof, or at leaſt ſome of them, probably might be the Inſufficiencies of theſe Informations.

And finding alſo the Authorities in Print which have been cited to be all againſt him, and none for him, endeavoured to maintain the Information as brought not againſt the Corporation, but againſt the Citizens or Inhabitants of the City in their Natural Capacities, and to that purpoſe cited the Caſe, C. En. 537. of a Quo Warranto againſt the Inhabitants of a Village, Quo Warranto they claimed to be a Body Politick.

And argued, That a Quo Warranto lyes againſt the Cives of ſuch a City, or Burgenſes or Tenants.

This ſeems to be rather a ſudden conceit, and altogether undigeſted, and not well conſidered.

But in anſwer thereunto, and to prove that this Writ is brought againſt the Defendants as a Corporation, and cannot legally be taken in any other Caſe.

If a Mayor and Commonalty plead that they are ſeized in Fee, they need not ſay in Right of their Corporation, the Name ſhews them to be a Corporation, it need not be alledged. Leo. 1. 153.

An Action there brought by the Guardians and Fellowſhip of Weavers; the Book ſaith, That they need not ſet themſelves out to be incorporate, the Name ſhews it ſo of Cities, ſaith the Book. Hob. 211.

So then, when the Writ is brought againſt a Mayor and Commonalty, or Mayor, Commonalty and Citizens, the Law takes notice of them to be a Corporation, and the Writ againſt them as ſuch; the Name ſhews it.

But againſt Inhabitants of a Village, a Writ brought by that Name that cannot be taken to be other than Inhabitants, the Name ſo ſhews it; and in ſuch Caſe, ſome of the Inhabitants, by Name (viz.) A. and B. appear in Perſon, in their own, and Names of the reſt of the Inhabitants, and plead, and are Defendants, Co. En. 537. So did they, as appears in that Precedent. No appearance ever was of Inhabitants in other manner.

But in this Caſe here are no Perſons that do appear by Name, but the Corporation appear, and make an Attorney under their Common Seal. The Corporation, and no particular Perſons, are the Defendants before you, or elſe you have no Defendants before you; for there is none appearing in Perſon, here is no Defendant, nor none againſt whom you can give Judgment;

Judgment; but all the whole Proceedings vain and against no body.

So that if we should admit, as Mr. Attorney argues, That this Information is not brought against the Corporation; then there can be no Judgment for want of Defendants appearing in their Natural Capacities; you must have it against the Corporation, or no body. A Mayor cannot be but where there is a Corporation; therefore this Notion impossible, as I conceive.

So that if there were nothing else in the Case, if the Information be ill brought, they can have no Judgment against us.

2. But admit that the Information as to this Point be sufficient, Then I proceed to consider the other parts of this Case, The Plea.

That contains the Defendants Title (viz.) That she is a Corporation time out of mind, and many Confirmations by Acts of Parliament and Charters, It is not denied but that the Title made by the Plea is good.

But next the Replication, that contains,

(1.) An Issue upon the Prescription (viz.) That the Citizens of *London* have not been time out of mind a Corporation by Name of Mayor, Commonalty, and Citizens, *&c.*

(2.) A Pleading over, That the Mayor and Commonalty and Citizens taking upon them (*assumentes super se*) to be a Body-Politick, and to have Power to make By-Laws.

1. Colore inde, but for their private Gain, & contra fiduciam per Dominum Regem & Leges hujus Regni in them reposed, took upon them to raise Money upon the King's Subjects by colour of an Ordinance by them de facto made, and in Prosecution of this usurped Power.

17 Septemb. 26 C. 2. The Mayor, Commonalty and Citizens in their Common Council assembled, Published a Law for Levying Money upon the King's Subjects that came to the Markets within the City. (viz.)

De qualibet Persona, for every Horse Load of Provisions brought into any Publick Market within the City to be sold, 2 d. a Day, for every Dozen of Provision 1 d. a Day, for every Cartload drawn with not more than three Horses 4 d. a Day, if with more, 6 d. a Day.

That if any refused to Pay, he should be amoved from his place in the Market.

That by Colour of this By-Law, the Mayor, and Commonalty and Citizens have Extorted great Sums of Money for their own private Gain, amounting to Five thousand Pounds per Annum.

2. And further, That whereas there was a Session of Parliament holden 21 Octob. 32 C. 2. and continued till the 10th of Jan. 82. and then by the King Prorogued to the 20th of that instant January.

The

The Mayor, Commonalty and Citizens, Jan. 13. in their Common Council aſſembled, malitioſe, adviſate, & ſeditioſe, abſque legali Authoritate, in ſe aſſumpſerunt ad cenſendum & judicandum dict' Dom' Regem nunc, & Prorogationem Parliamenti, by the King prorogued; and in the ſame Common Council, Vota & Suffragia ſua dederunt & ordinaverunt.

That a Petition ſub nomine the Mayor, Aldermen, and Commons of the City of London, in Common Council aſſembled, to the King ſhould be exhibited: In which Petition it was contained,

That by that Prorogation the Proſecution of the publick Juſtice of this Kingdom, and the making neceſſary Proviſion for the Preſervation of the King, and his Proteſtant Subjects, had received Interruption.

And that the Mayor Commonalty, and Citizens, in the ſame Common Council, did unlawfully, malitioſe, adviſate, & ſeditioſe, with intent that the ſame Petition might be publiſhed and diſperſed among the King's Subjects, to induce in them an Opinion, that the King had by that Prorogation obſtructed the publick Juſtice, and to incite hatred againſt the King's Perſon and Government, and to diſturb the Peace, did order that Petition, containing the ſaid ſcandalous matter, to be printed, and thereupon to thoſe ill Ends and Purpoſes they cauſed it to be printed and publiſhed:

By which the Mayor, Commonalty, and Citizens, the aforeſaid Liberty and Franchiſe of being a Body Politick forisfecerunt, and after, by the time in the Information, have and yet do uſurp it.

Before I come to the matter, I would ſpeak to the Pleading herein, and in the ſubſequent Surrejoinder: And for the Pleading in it, I think it is as ſingular and unprecidented as the Matter of it is.

This Replication, ſuppoſing the matter had been the Act of the Body Politick, and good and ſufficient, yet, as pleaded, is inſufficient, and not warrantable by any Law or Practice ever known. It contains,

1. An Iſſue, viz. no Corporation time out of mind.

2. Two Cauſes of Forfeiture of the Corporation, admitting they once were a Corporation.

So that though the point in queſtion be but one, viz. whether we are lawfully a Corporation or no Corporation, though the Plea is ſingle, that we are a Corporation by Preſcription time out of mind, yet here is to try this point,

1. An Iſſue.

2. A double Plea, alleadging two Cauſes to avoid it for a Forfeiture.

This I conceive cannot legally be done, though in the King's Caſe. I do agree, the King hath great Prerogatives in Pleadings,

dings, and as far as ever they have been allowed or enjoyed, let them be so still; but that the King can to the same matter both take Issue, and also plead over at the same, that I deny.

It is most reasonable, that the Law should be carefull to preserve the King's Rights; but on the other side, I think it is not reasonable, that the Law should admit or allow as legal any way of Proceeding that should destroy or render the Subjects right indefensible, be his right as good as it may be. If so be that Mr. Attorney may both take Issue upon the Fact, and also plead over, I would, by your leave, ask how many Issues, and how many Pleas over the King's Attorney may have?

Suppose the King bring a Quare Impedit, or Writ of Right, or any other Action, the Defendant makes his Title, which is usually done, by many Grants and Conveyances from one to another, to bring it to himself.

May the King's Attorney now take as many Issues as facts issuable, plead as many Pleas as he pleaseth, and all this simul & semel? 'Tis true, that in this case Mr. Attorney hath assigned only two Breaches, or Causes of Forfeiture; but he might, if he had pleased, by the same Reason, have assigned 200. If this may be, Are we not all at Mr. Attorney's Mercy? If this may not be, then how many Pleas? Is it in Law defined?

In favorem Vitæ a man may plead a special Plea, and plead also not guilty, but not several special Pleas; but that there is any such Prerogative for Mr. Attorney, in Suits betwixt the King and his Subjects, I can find no Instance or Authority for it.

For though it be true, as I have said, that the King hath great Prerogatives in pleading, yet it is as true that this is not boundless; but that if in the King's Writs there be mistakes, or his Writ or his Action misconceived, he shall be bound by it in like manner as Subjects are or shall.

Partridge against Strange, and in the same Book in my Lord Berkley's Case, it is expressly said, That though the King hath many Prerogatives, concerning his Person, Debts, and Duties, yet the Common Law hath so admeasured his Prerogative, that it shall not take away or prejudice the Inheritance of any.

Com. 84. a 236. a

The King hath a Prerogative that he may wave his Demurrer and take Issue, or wave his Issue and demurre upon the Plea: But, saith the same Book, he must doe it the same Term, not in any other Term, for then he may doe it *in infinitum*, without end, and the Party hereby may lose his Inheritance; and for that the Common Law will not suffer the King to have such a Prerogative.

Com. fol. 236.

These are the words of the Book.

And in the point that this Prerogative must be made use of the same Term, and that the King's Attorney cannot vary in another Term, and wave his Issue, is 13 E. 4. 8. Bro. Prer. 69. 28 H. 8. 2.

So

So in making Title to a Quare Impedit, he at the end of the Term waved his firſt Title, and made another.

But it is true alſo, that as to the point of Waving Demurrers, and taking Iſſue in another Term, there is authority that he may ſo doe; but whether it may be done or not in another Term is not material to our caſe: But the uſe I make of theſe Caſes is to prove that the King's Attorney ſhould not have both together ſimul & ſemel, as in this caſe he hath done; he muſt wave one before he can have another Plea. Rex verſ. Bagſhaw. Cr. 1. 347.

For thoſe Debates about his varying his Plea by waving his Iſſue and demurring, or waving his Demurrer and taking Iſſue, ſignifie nothing, if he may in one Plea, and at the ſame time, take Iſſue, and demurre, or plead over to the ſame matter or point, as is done in this caſe; therefore thoſe Books ſtrongly prove, that the Prerogative that the King hath is by waving or relinquiſhing one, and chuſing the other; and therefore not to have or uſe all together and at once, as is done in this caſe.

The King ſhall be bound by one Iſſue, he ſhall not have divers. 9 H. 4. 5.

So that as this Replication is at the ſame time ſimul & ſemel to the ſame matter, to take Iſſue that we were not a Corporation time out of mind, and to plead two matters of Fact for Forfeiture, is the firſt attempt that ever was of this kind, and in its conſequence confounding the right of the Subject, and leaves him perhaps only but a colour of Law, but moſt difficult, if not impoſſible by it to be defended, let his Right be what it will, if Iſſues and Pleas without number may be by the King's Attorney joined and pleaded, and the Subject muſt anſwer, the very charge beſides will undoe the Subject, and weſt him out of his Eſtate by the Law that ſhould preſerve him. This point, if I miſtake not, will deſerve conſideration, if it be new, and the firſt project (for ſo I beg leave to call it) of its kind, for I know no Book or Inſtance of the like, unwarrantable by old Laws and Rules of Pleading. The old Laws and ways are good and ſafe,

Eventos varios Res nova ſemper habet.

Perhaps the conſequence and miſchiefs attending this way of joining Iſſue, and at the ſame time pleading over as many Pleas as Mr. Attorney pleaſeth, are as great as any other in this caſe, and not leſs to be minded or regarded. As of the one ſide great are the King's Prerogatives, and moſt neceſſary to be preſerved, and maintained; ſo it cannot be denied but that the Law hath ſet Limits and bounds, which muſt be kept and obſerved in pleading, which is the Method and Mean of preſerving and determining Rights, without which no man can be preſerved by the Law.

But supposing that several Causes or Forfeitures may be assigned, yet they must be all Facts done at the same time, or they confound one the other; for if the first Fact was a Forfeiture, thereby the Corporation was determined, and at an end, and the subsequent could not be the Act of the true lawfull Corporation, for that was forfeited, determined, and gone, by the precedent Forfeiture: And if so, that it was forfeited and gone by the precedent Act, viz. the making the Ordinance Septemb. 17. 26 C. 2. Then how could it act and forfeit it self six years after, in the Year Thirty two? This seems impossible.

But to avoid this:

Mr. Attorney in his Argument doth hold, That though the Act be a Forfeiture, yet till there be a Judgment, or something on Record to determine the Corporation, (and in this case the Judgment to be given shall doe that Work,) till such Judgment the Corporation remains. Then taking it as Mr. Attorney will have it, and as the truth is, supposing a Forfeiture, untill that Forfeiture appear on Record, or that there be some Office or Inquisition that finds it, and that return'd, and on Record, were it of any Estate in Lands, Tenements, Hereditaments, or Offices, it is not determined or vested in the King, but continues. This is quite contrary and contradictory to all that you have done, and the very Foundation of this Quo Warranto; for if you admit, as then you do, that the Forfeiture ipso facto, did not determine, but that it must be this Quo Warranto, or Judgment upon it, that must determine the Corporation, and that the Corporation, notwithstanding such Act, was or is in being; then they have not usurped upon the King; they are the same Corporation they were; they have the same power to act they had; they have the same Warrant and Right they had, only subject to a Judgment against them, that may be given hereafter, for a Fact already past; for since that an Usurpation is a sortious and wrongfull using a Liberty or Franchise upon the King, without lawfull Authority. Then

Supposing such an Act of Forfeiture doth not ipso Facto determine or dissolve, but a Judgment, or some other Act of Record, must first be had, before such dissolution; then till such Judgment, or Act of Record, they are lawfully a Corporation in being, and their lawfull Warrant remains, and they did not, nor could so long usurp their Being, and then hereby is your own Information destroyed and abated: For there you say that they did by the space of a month, without any Warrant, use and usurp the Liberty to be a Corporation. But hereby you grant that it was not used unlawfully, nor usurped, but notwithstanding the Forfeiture the Corporation lawfully continued, unless there had been some Judgment, or other Act on Record to determine it.

This I rest upon as impossible to be avoided.

Is it possible that a Corporation or Body Politick can at the same time be lawfully and rightfully such, and not lawfully and right-

rightfully ſuch? Can right and wrong be the ſame? Can the ſame thing rightfully be or have its Being, and at the ſame time not rightfully be or have its being? Can we poſſibly be at the ſame time, viz. the time mentioned in the Information, a lawfull Corporation, and yet an uſurped or unlawfull Corporation? Could we then have a lawfull and rightfull Authority to be a Corporation, and at the ſame time have no lawfull or rightfull authority to be ſo?

Theſe ſeem to be contradictions, and if ſo, are the moſt difficult of all things to be believed or impoſed; therefore to be plain in this matter, either tell us that we are yet till Judgment a Corporation or Body Politick lawfully and rightfully, or not. If you ſay we are, then as yet we are no unlawfull Corporation, nor have uſurped to be one, as in your Information and Replication you have alleadged. We have not then unlawfully taken upon us to be a Corporation, and therefore cannot have Judgment againſt us, or be fined for having or being that which we lawfully have or be, as you now admit we are, conſequently you muſt go ſome other way, you have deſtroyed your own Information, and can have no Judgment upon it.

But perhaps this conceſſion of Mr. Attorney, that the old and lawfull Corporation and Body Politick is ſtill in being, and ſhall ſo continue, till by Judgment or Matter on Record determined, may only be ſome ſudden thoughts; for not only the Matter, but the whole Proceedings in this Suit being at leaſt unexperienced, and perhaps much out of practice, it might eaſily happen, that in an haſty Proceedings all things might not be thought on, nor all the Objections or Inconvenienties foreſeen, and perhaps the conſequence of the Poſition, that a Miſcarriage, or doing an unlawfull Act, ſhould ipſo facto forfeit the Body Politick or Corporation, might make a man ſtart, and caſt about how to avoid it, and flying from one danger run into another. Theſe are things ordinarily happening, and perhaps have in this caſe happened, and were the cauſe of this confeſſion, that the old and lawfull Corporation is yet in being, which is contrary to the whole frame and ſcope of both the Information and Replication, and probably never thought on or intended when the Information or Replication was made, being quite contrary and inconſiſtent with the frame and foundation of them both,

If it be holden according to this conceſſion, that the old and lawful Corporation was not by the ſuppoſed Acts of Forfeiture diſſolved and determined ipſo facto, but remained and continued lawfully a Corporation, and yet is ſo; then we have not uſurped, but are a lawful Corporation during the time in the Information, and not as therein ſuppoſed by Uſurpation, and without lawful Authority; and thereby the Information confounded and abated.

But

But supposing, according to what the Information and Replication suppose,

That the Acts of Forfeiture did ipso facto dissolve and determine the Corporation, for they will (at last I doubt) come to that again; for this present thought that it shall be forfeit, but not dissolved or determined till Judgment, will be subject to almost all the same inconveniencies; for when Judgment given, the Forfeiture must relate to the time of Offence, and to avoid all mean Acts as in other Cases it doth. But to pass over.

(3.) Supposing the Information good, the Replication good, and the Matters alledged for Forfeiture to be as in the Replication alledged.

The next thing I pray leave to speak unto, is,

Whether the Matter alledged in the Rejoynder be not sufficient to justifie or excuse the two Facts alledged for cause of Forfeiture.

I conceive they are.

The Pleadings here must first be stated,

(1.) As to the Ordinance or By-Laws for the Toll in the Markets. As to that the Defendants in their Rejoinder have alledged.

That the City of London is, and was always the capital and most populous City of the Kingdom. That there are and always have been great publick Markets within the said City. That the Mayor, Commonalty and Citizens, are and always have been seised of those Markets in their Demesne as of Fee; and at their own proper Charges provided Market-places, Stalls, Standings, and other Accommodations for Persons coming to those Markets; and Overseers and Officers for better regulation and keeping good order, and cleansing the same. That for defraying those Charges, they have, and always had and received divers reasonable Tolls, Rates, or Sums of Money of all Persons to those Markets coming, for Stalls standing, and other accommodations by them had for exposing to Sale their Victuals and Provisions in those Markets. That the Freemen of the City of London are numerous, above fifty Thousand. That there hath been time out of mind a Common-Council, consisting of the Mayor, Aldermen, and certain Freemen annually Elected, not exceeding the number of two Hundred and fifty, called the Commons. That there is a Custom within the City, that the Common-Council make By-Laws and Ordinances for the better Regulation and Government of the publick Markets, and for the appointing convenient places and times when and where within the City the Markets shall be kept; and for the assessing and reducing to certainty reasonable Tolls, Rates, or Sums of Money to be paid by Persons coming to the same Markets, for their Stalls, Stations, and other Accommodations by them had for exposing to Sale their Victuals as often as, and when to them should be thought expedient, so as their Ordinance be useful to

the

the King and his People, conſonant to reaſon, and not contrary to the Laws of the Land.

That this Cuſtom is confirmed by Mag. Char. Stat. 1. E. 3. Stat. 7. R. 2.

That after the Burning and Rebuilding London, and the alterations thereby made, Controverſies did ariſe within the City concerning the Markets and the Tolls. That thereupon Sir William Hooker, then Mayor, and the Aldermen and Commons in Common Council aſſembled, did make an Ordinance, Entituled, An Act for the Settlement and well ordering the ſeveral Publick Markets within the City. By which reciting, That whereas for accommodation of Market-people, with Stalls and Neceſſaries for their ſtandings, for cleanſing and paving the ſame, for defraying incident Charges about the ſame, reaſonable Rates had always been paid. To the end the Rates to be paid might be aſcertained, That the Market-people might know what to pay, and the Officers what to take; to avoid extortion, it was ordered there ſhould be paid by the Market-people for their Stalls, Standings and Accommodations in the Markets,

For every Horſe-load of Proviſion under publick ſhelter 2 d. a day; for every Doſſer 1 d. a day; for every Cart-load drawn with not above three Horſes 3 d. a day; with more Horſes 4 d. a day, and upon refuſal to pay to be removed. Then they aver that theſe Rates are reaſonable. That they are all the Rates that are paid by ſuch Market-people to the uſe of the City. That theſe Rates they have received ſince the making theſe Ordinances. That there is no other Ordinance for raiſing Moneys for ſuch Proviſions expoſed to Sale in their Markets in any manner made.

To this Reſoinder Mr. Attorney hath ſur-reſoyned, and taken it by Proteſtation, That the City were not ſeiſed of the Markets, nor at their own Coſts provided Stalls and other accommodations; and that the Rates by the Ordinance appointed were not reaſonable. For Plea ſets forth, An Act of Parliament made 22 Car. 2. Enacting, That to the end apt and convenient Places within the City ſhould be put out for Buildings, and keeping the Markets; and that the Royal Exchange, Old-Baily, and common Gaols and Priſons within the City ſhould be made more commodious for the enabling the City to do theſe things, they ſhould have a Duty out of Coals imported betwixt May 1670. and Mich. 1687. into the Port of London, 12 d. per Chaldron; which Duty they have accordingly received, amounting to a great Summ, and notwithſtanding that Duty, without Title or Right, the Defendants made the By-Law for their private Gain, abſq; hoc, that the Mayor, and Commonalty, and Citizens have time out of mind had, or accuſtomed to have,

Tolneta ratas ſive denariorum ſummas per ipſos Majorem Communitatem ac Cives Civitatis predict' ſuperius ſuppoſit' fore per præfat' legem ſive ordinationem predict' aſſeſſ. & in certitudinem

dinem reduct' prout per placitum superius rejungend' supponitur.

The Defendants they rebutt and say, That they have always had reasonable Tolls, Rates or Summs of Money of all Persons coming to their Markets to sell their Provisions for their Stalls and accommodations: Et de hoc ponit se super patriam: Le Attorney Demurs.

Upon his Pleadings the Questions are, Whether the matters alledged by the Defendants, in Justification of the Ordinance, or By-Law, be a good Justification in Law or not. If it be, Mr. Attorney in his Sur-rejoinder hath given no answer to it at all, he hath neither confessed it, nor denied it. The Rejoynder saith, That the Defendants are and always have bin seised of the Markets in Fee.

That they at their Charge provided Market-places, Stalls, Standings, and Officers for the accommodations of the Markets, and cleansing them. That for defraying those Charges they have always had divers reasonable Tolls and Rates for Standings and other accommodations. That the Common-Council have, as often as expedient, always made Ordinances for regulating those Markets, and for asselling and reducing to certainty reasonable Tolls, Rates and Summs of Money to be paid by the Market-people for their accommodations.

That according to this Custom, they made the Ordinance and by-Law,

Mr. Attorney in his Sur-rejoinder hath not denied any part of this; but offers a traverse to that which is no where alledged or supposed. It is never pretended that the City have had time out of mind the very Tolls and Summs of Money for Toll assessed by the Ordinance. There is not a word in the Rejoinder to that purpose, but to the contrary; (viz.) That they in their Rejoynder claim a Power by Ordinance of Common-Council to assesse and set the Rates of these Tolls and Payments as often as and when to them shall seem expedient. It is admitted in the Rejoinder, that these Summs were not time out of mind, only they had Power to sett, and assels, and ascertain, as often as expedient. Therefore when Mr. Attorney traverseth our having time out of mind the Tolls, Rates and Summs of Money by the Ordinance assessed, and in certitud' reduct' This is plain, besides any thing claimed or pretended unto, If he had intended to traverse what we have alledged, that we have had time out of mind divers reasonable Tolls & Summs of Money for Stalls and Accommodations: Or if he would have traversed the Instance alledged for the Common Council asselling those Tolls, as often as expedient, that was plain and easie to doe; but that he hath not done: He hath only traversed whether the Tolls, Rates, and Summs of Money, by the Ordinance assessed, and reduced into certainty, have been time out of mind. This is the proper sense of his Traverse, but if doubtfull in its sense,

ſenſe, his Traverſe is naught for that cauſe; for dubious words can make no Iſſue for the Jury to try, elſe men ſhould be tricked and enſnared by doubtful words to pervert right. So that if the matter alledged in the Record, be ſufficient in Law to juſtifie the making this Ordinance, or By-Law; then what is done therein by the Act of Common-Council is lawfully and rightfully done, and no Forfeiture. I do agree, that for a Lord of a Market to preſcribe to have a Toll uncertain, and as often as expedient, to aſcertain it is no good Preſcription.

But that is not our Caſe; I do diſtinguiſh betwixt that and this Caſe: Where there is by Cuſtom, confirmed by Acts of Parliament, (for I ſhall ſhew that they are Acts of Parliament, notwithſtanding what hath been objected againſt them,) a Power and Authority veſted in the Lord Mayor, Aldermen, and Common-Council, to regulate and order the People, Trades and Markets in the City, and the Places and Conveniencies and Officers from time to time, and conſequently to regulate and aſcertain the Tolls or Rates to be paid by the Market-people, to prevent Extortion and Diſorders.

That ſuch Cuſtom is legal. The Chamberlain of *London*'s Caſe. An Ordinance that no Broadcloth ſhall be ſold in the City before it be brought to *Blackwell-Hall* to be ſearched, and a Penny for every Cloth to be paid for Hallage, under pain for forfeiting 6 s. 8 d. a Cloth, to be recovered in the City Courts. Rep. 5. 69.

Though objected that this was an Impoſition of payment of Money upon the King's Subjects, yet adjudged good, and a Procedendo granted,

An Ordinance that no Unfreeman ſhall uſe a Trade in *London*, adjudged good. City of *London*'s Caſe, Rep. 8 fol. 1.

A multitude of Ordinances they have for regulating all manner of Trades, and of Rates and Prizes. And as much reaſon there is to object againſt them, as this Ordinance, or the Cuſtom in this Caſe: But the City of London have a Government and Power of making Ordinances, for governing and regulating Trades, buying and ſelling within the City, placed in the Common-Council, and confirmed by Act of Parliament; and therefore not like the Caſe of any private Lord of a Market. But 'tis true, their Ordinances muſt not be unreaſonable. The Payments that are impoſed by this Ordinance, are only impoſed upon thoſe that are under ſhelter; 'tis reaſon a recompence ſhould be paid, and there is no unreaſonableneſs or injuſtice appears in the Ordinance, but a reaſonable recompence. But the Cuſtom or Power of the Common-Council is not denied, as I take it: For, they have not denied the Power to regulate and aſcertain the Tolls or Summs of Money alledged to be in the Common-Council, if they had, that muſt have been tryed: Nor have they denied the Rates ſet to be reaſonable. So that I think as to this matter, we have well entitled our ſelves, and

justified our making our By-Law, and taking the Tolls or Rates thereby appointed; and nothing in the Surrejoinder against us to the contrary objected.

But for confirming and making good our Customs, in the Plea there are three Acts of Parliament pleaded.

1. Magna Charta:
2. Stat. 1. E. 3.
3. Stat. 7. R. 2.

The King's Council have not denied Magna Charta to be a Statute, but have denied the other two to be Statutes, or Acts of Parliament; and the reasons given by them are,

Obj. 1. Because not in Print, nor Roll of it to be found; or because no body knows where to find it.

Resp. 1. Private Acts of Parliament do not use to be Printed, few are.

2. No Roll to be found; Suppose there were not, doth this after so long a time conclude there was none such, especially since Mr. Sollicitor was pleased to acknowledge that there are no Parliament Rolls of E. 3. till 4 E. 3.

It is true that almost all the Parliament Rolls of H. 3. E. 1. E. 2. and till 4 E. 3. are almost all lost. But besides in those days publick Acts were not only entred upon the Parliament Rolls, but from thence transcribed, and sent under the Great Seal to be published by the Sheriffs of the Counties, in the Cities and Boroughs, and also by Writ to the Courts in Westminster-Hall to be there entred and recorded, of which there are many found, especially in the Exchequer, and hence came the rule in Law, that Judges ex Officio, are bound to take notice of general Acts of Parliament: But for private Acts they were put under the Great Seal, and the Parties interested had the same to produce. But that these in this Case should be questioned to be Acts, is strange. But to prove them Acts: First,

1. As to the Act 1 E. 3.

1. We have pleaded it under the Great Seal of King E. 3. that made it with a profert hic in Cur' and shewn it with our Plea as we ought; and this is Evidence sufficient of it self. If the same produced under the Great Seal put to it when made, be not sufficient Evidence to satisfie, what can be?

Trin. 1. E. 3. r. 61, 62. 2. But in this Case it is enrolled upon record also, Inter placita Corone penes Camerarios in Scaccario; it is enrolled there.

Obj. But perhaps it may be objected also, That this was no Act of Parliament, but only a Grant or Patent in Parliament; because 'tis that the King de assensu Prelator' Comitu' Baron' ac totius Communitat' regni in præsenti Parliamento.

Resp. That Acts of Parliament observe not any certain Form.

Jones, 103. In the Case of the Earldom of Oxford express, that there was variety in Penning Acts of Parliament in ancient time, Dominus Rex per Consilium fidelium subditor'

ſub ſitor' ſuor' ſtatuit, and other forms there, are yet good Acts. But that they were anciently in form of Patents or Grants in Parliament, Magna Charta, *C.* 1. is in form of a Charter or Grant. The form of the Act of Parliament 11 E. 3. for creating the Prince, Prince of Wales, begins, Edwardus Dei gratia, &c. in form of Patent, and is De communi aſſenſu & conſilio Prelator' Comitu' Baron' & aliorum de conſilio noſtro in preſenti Parliamento, and adjudged a good Act of Parliament, and the Authorities and Reaſons to prove it an Act of Parliament are fol. 18, 19, 20. ſo full, that it might be thought that this Objection would never have been made. And that this is in the ſame form that all the reſt of the Acts of this very Parliament of the 1 E. 3. are, appears by the Patent Roll of the ſame Parliament. A Charter granted by the King de aſſenſu Prelator' Comitu' Baron' Communit' Regni in Parliamento apud Weſtm' to enable the City to apprehend Felons in Southwark.

Princes Caſe, R. 8. fol. 8.

Membr. the 17.

An Act in the ſame form for the annulling the Conviction of Treaſon that was againſt Roger Mortimer, in the time of E. 2.

Rot. Clauſ. 1 E. 3. M.

An Exemplification then entred of an Act made in the ſame form in the ſame Parliament, for the annulling the Attainder of Thomas Earl of Lancaſter, attainted tempore *E.* 2.

Rot. Pat. 2 E. 3. P. S. 1. M. 17.

Divers other Acts of Parliament in the ſame form made 1 E 3. for annulling divers other Attainders that were tempore E. 2. ſo that as to this Act of Parliament 1 E. 3. I think the Objections are anſwered, and that it is an Act as pleaded.

Rot. Pat. 2 E. 3. P. S. 2. M. 11. Inſt. 2. 527. 639.

And as to the other Act 7 R. 2. that that is no Act of Parliament, only a Prayer of the Commons that there might be a Patent granted to the City, confirming their Liberties, licet uſi vel abuſi fuerint; and the anſwer was, Le Roy le vieult, and object for Reaſons againſt that being an Act of Parliament,

Obj. 1. It wants the aſſent of the Lords.

2. It is only a Prayer of the Commons to have their Liberties confirmed, and the King's anſwer le Roy le vieult, but nothing done to confirm it.

Reſp. 1. As to the firſt Objection.

Suppoſing it true that there is no mention made of the aſſent of the Lords, yet the Act is a good Act.

1. It appears to be in Parliament ad inſtantiam & requiſitionem Communitat' Regni noſtri in preſenti Parliamento.

2. The anſwer in Parliament that is given by the King to the making all Laws is given to this, [le Roy le vieult.]

3. And next, it is admitted to be upon the Parliament Roll, 7 R. 2. Num. 27. I have before said that Acts of Parliament are not in any certain form; sometimes entred as Charters or Grants, sometimes as Articles, sometimes and frequently as Petitions; the Books I have already cited prove it. But according to the Course of Parliaments, let it be in what form it will, let it begin in which House it will, yet it must go through both the Houses of Parliament before it can come to the King for his Royal assent. If either House rejects or refuseth, there it ends, it comes not to the King; nor is the Royal assent in these great operative words [Le Roy le vielut] in Parliament given to any thing but what the whole Parliament have assented and agreed unto. So that this is an Objection grounded upon a Reason contrary to all the course of Parliaments, which shews that the Lords assent was to it though not mentioned.

Selden's Mare Claus. 249. gives a full Resolution herein: Certissimum est, saith he, that according to Custome no Answer is given, either by the King, or in the King's Name, to any Parliamentary Bills, before that the Bill, whether it be brought in first by the Lords, or by the Commons, hath passed both Houses, as it is known to all that are versed in the Affairs and Records of Parliament. And in the Prince's Case, before cited, there the Act is said to be de Assensu & Consil' of the Lords, but doth not name the Commons, And this Answers the other Reason also, viz. That it should only be a Prayer and Petition also, to have a Charter of Confirmation granted: For since the Forms are in manner of Petitions, since the Royal Assent or Words, Le Roy le vieult, is never put to any Bills in Parliament, but such as are thereby made and passed into Laws, the giving the Royal Assent is sufficient in this Case to prove it a Law. But for farther Evidence,

1. We have it under the great Seal of King R. 2. thus penn'd. Ad instantiam & requisitionem Communit' Regni nostri Angl' in presenti Parliamento nostro pro majori Quiete & Pace inter Legeos nostros, focendis, & pro bono publico de assensu Prelatorum Dominor' Procerum & Magnat' nobis in eodem Parliamento assistentium, &c. So that hereby it is fully proved, and shewn, that though the Assent of the Lords be not mentioned in the Copy, yet that it was had, and under the Great Seal of R. 2. it so appears. We have also in our Book of the Acts of that time in the City, the Proclamation made upon the first promulging this Act, in the time of Sir Nicholas Brembre, Lord Mayor, and therein it is also entred in the same words, as before, under the Great Seal of R. 2. de assensu Prelator', &c. Next our Books and continual Practice ever since. 'Tis true, that in the 7 H. 6. fol. 1. when 'tis said, that the Customs of London were confirmed by Statute, Quære what Statute; but it is not there made a Quære whether this were a Statute; Instit. 4. 250. Rep. 5. 63. Rep. 8. 162.

Lib. H. f. 169. a & b

162. all ſay that the Cuſtoms of London are confirmed by Parliament, 7 R. 2. Juſtice Jones 283. hath it verbatim out of the Parliament Roll. The conſtant courſe of pleading the Cuſtoms of London is to plead a confirmation of them by this Act of Parliament: So that as to this point there is not any one Book or Opinion, before this day, in favour of what is affirmed, that theſe are not Acts of Parliament; and our Plea ſtands good in Law, and the Ordinance, and By-Law, and Cuſtom good, and then no Forfeiture thereby.

3. But ſuppoſe and admit, that this By-Law be the Act of the Corporation, be not good and ſufficient in Law, nor in Law juſtifiable, Quid ſequitur? Then it is void in Law. Then if it be void in Law, How can it make a Forfeiture? Suppoſe a Leſſee for years, or for Life, makes a Feoffment, but it is not duly executed for want of Livery and Seiſin, by which it is void in Law, Can this make a Forfeiture of the Eſtate of the Leſſee? Suppoſe a Corporation Tenant pur auter vie makes a Feoſment which is void for want of Livery duly made, Will this forfeit their Eſtate? A void Act ſhall not deſtroy or forfeit a precedent Eſtate. A Parſon that hath a former Benefice accepts a ſecond Benefice incompatible, was inſtituted and inducted, but did not read the the Articles, his firſt Benefice was not forfeit or void hereby becauſe by the Statute the not reading his Articles had made his Inſtitution and Induction void. So that then whether this By-Law or Ordinance were good or void in Law, perhaps is not much material; it cannot make any Forfeiture of the Corporation, it can have no ſuch effect: for if it be a good and lawfull By-Law, no Forfeiture can be for doing a good and lawfull Act. If the Ordinance be not warrantable by Law, then it is void in Law, if void in Law, a void Act can make no Forfeiture. Dy. 377. b.

Obj. But you received and exacted from the Kings Subjects Summs of Money by this Ordinance.

Reſp. Suppoſe we did, and that we had no right to have this money, if an Officer, by colour of his Office, receive more than is due, it is Extortion, and a Crime puniſhable: But if a Perſon that is no Officer take money that is not due, or more than is his due, the Parties injured have their Remedies by Action; but this is no Crime for which any Forfeiture or Penalty is incurred by the perſon that ſo takes or receives the money. Suppoſe a Lord of a Manour exact or take greater Fines or Summs of Money from his Copyholders or Tenants than he ought, they have their Remedies by Actions againſt thoſe that receive; ſo if a Corporation receive or take moneys ſuppoſed to be due, but in truth is not, how can this Forfeit any thing.

Obj.

Obj. But you took upon you a Power and Authority to tax the King's People, and to take and receive the money so taxed.

Resp. This is but the same thing, only put into greater words. It is still but the making of an unlawfull By-Law, and thereby appoint money to be paid which ought not, or more than should be; and the turning of it, or expressing it in stately words, of taking upon you, or usurping Authority to impose upon, and tax the King's People. Whosoever doth any act or thing, he takes upon him, and doth also execute the Power and Authority of doing that act or thing which is comprehended in the thing done. The making a By-Law, or Ordinance, whereby more is ordered to be paid than ought, or money appointed to be paid where none is due, is still all the fact and thing done, and if that make no Forfeiture of the Corporation, or Crime punishable by Indictment or Information, except only as the Statute 19 H. 7. c. 7. which I shall hereafter mention, hath appointed for Forfeiture of 40 s. The taking or usurping the Power to doe it, cannot be more, or effect more, than the doing the thing which comprehends it.

(2.) As to the other Cause alleadged in the Replication for Forfeiture, the Petition printing and publishing it.

In the Replication 'tis alleadged, That a Parliament the 10th of January was prorogued to the 20th of January. That the 13th of January the Mayor, Commonalty, and Citizens of London, in their Common Council assembled, malitiose, advisate & seditiose, took upon them ad judicand' & censand' the King, and the Prorogation of the Parliament by the King so made; and that the Mayor, and Commonalty, and Citizens of London, so in the said Common Council assembled, did give their Votes and Order, That a Petition, in the Name of the Mayor, Aldermen, and Commons of the City of London, in Common Council assembled, should be exhibited to the King. In which Petition it was contained, That by that Prorogation the prosecution of the publick Justice of the Kingdom, and the making necessary provisions for the Preservation of the King, and his Protestant Subjects had received Interruption. And that the Mayor, Commonalty, and Citizens of London, in Common Council as aforesaid assembled, did malitiously, and seditiously, to the intent the same should be dispersed among the King's Subjects, and to cause an Opinion that the King obstructed the publick Justice, and to stir up Hatred and Dislike against the King's Person and Government, did order the said Petition to be printed, and afterwards they did print it, and caused it to be published.

Rejoinder as to the Petition.

The Defendents in their Rejoinder to this Breach set forth and alleadg, That there was a Plot against the Life of the King, the Government,

ment and the Proteſtant Religion, and ſet forth all the Proceedings upon it, the Attainders and Impeachments of the Lords in the Tower in Parliament depending, the Proclamations declaring the Dangers by this Plot, that they could not otherwiſe in humane Reaſon be prevented, but by the Bleſſing of God upon the Conſultations and Endeavours of that great Council the Parliament, and commanding a General Faſt to be kept in London the 22d of December, and that it was kept accordingly. The Proceedings in the Parliament towards the Tryall of the Lords, and preparing Bills to be enacted into Laws, for preſervation of the King and his Subjects againſt theſe Plots and Conſpiracies. That divers of the Citizens, loyal Subjects, being much affrighted, and troubled in their Minds, with the apprehenſion of theſe Dangers, did exhibit their Petition to Sir Patience Ward, then Lord Mayor, and the Aldermen, and Commons in Common Council then aſſembled, containing their Fears, and Apprehenſions, and Expectations, from the King and that Parliament, did petition, that the Common Council would petition for the ſitting of that Parliament, at the time prorogued. And thereupon the Mayor, and Aldermen, (naming them) and Commons in Common Council aſſembled, from their hearts truly loyal to the King, and for the ſatisfaction of the Citizens, who had exhibited that Petition, and of intent to preſerve the Perſon of the King, and his Government, did give their Votes, and order a Petition ſhould be exhibited to the King in the Name of the Mayor, Aldermen, and Commons in Common Council aſſembled, and ſet forth the Petition in the Name of the Mayor, Aldermen, and Commons in Common Council aſſembled in hæc verba:

Wherein among other things it is contained, That they were extremely ſurpriſed at the late Prorogation, whereby the Proſecution of the publick Juſtice of the Kingdom, and the making proviſions neceſſary for preſerving the King's Perſon, and his Proteſtant Subjects, received Interruption. And did farther agree and order, That that Petition, after it had been preſented ſhould be printed, which was ſo ordered with intent. That falſe Reports concerning the Petition might be prevented: The Enemies of the King and the Conſpirators from proceeding in the Conſpiracy deterred: The Troubles in the minds of the Citizens alleviated, and the Citizens know what had been done upon their Petition. That the Petition was delivered to the King, and afterwards printed. That this is the ſame Petition and Printing in the Replication mentioned abſq; hoc, that any Petition of or concerning the Prorogation of the Parliament was made, ordered, publiſhed or printed in any other manner than they have alleadged, as the Attorney General ſuppoſeth. To this part of the Rejoinder, Mr. Attorney hath demurred generally by the Demurrer, the Fact alleadged in the Replication is admitted to be true. And it is true, that there

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are no words, that are written or spoken, but are subject to various Constructions: But I take it that no words, whether written or spoken, ought to be taken in an ill sense, if they may reasonably be taken in a better, Nemo presumitur esse malus; and therefore the words must stand as they are penn'd: and having first expressed their Fears, and next their Hopes, from the King and Parliaments proceedings in Trial of those that were Impeached, and making Laws for their Security, and how they were surprized at the Prorogation, then they say, That by that Prorogation, the prosecution of the publick Justice of this Kingdom, and the making necessary provisions for the preservation of the King and his Protestant Subjects had received Interruption. It is mentioned only as a consequence of the Prorogation, 'tis not said or expressed that the King did interrupt, for I think there is great difference betwixt the one sort of expression and the other. An ill Consequence may attend a good, and commendable, and most necessary Act; but no Consequences can make an ill Act good; and therefore the expressing the Consequence, doth not necessarily condemn or declare the Act to be an ill Act. Suppose that in the time of the great Plague a man had had a Suit in Westminster-Hall, wherein all his Estate had been concerned, and had said or writ, That by the adjournment of the Terms by the King, the Proceedings of the Courts of Justice in his Suit had received an Interruption, had these words been punishable? The adjournment was then the most necessary and commendable Act that could be for the preservation of the King's Subjects in that raging Pestilence: and the Act it self being so good and necessary, though there were such Consequence as to that particular Suit, the writing or saying that it had such a Consequence, such an Interruption, did not, I conceive, condemn, judge, declare or express the Act to be ill. Suppose a man had had a Bill depending in that Parliament to be Enacted for the enabling him to sell his Land to pay his Debts, to free him from a Gaol: Or, suppose that some one of the Lords impeached in that Parliament had made a Petition for the Sitting of the Parliament, and had therein expressed as a reason and ground of his Petition, the like words as in this Petition. What would the Court have judged of it, are not the Cases much the same? if they are, there will be no distinction of persons in Judgment; I am sure there ought not. Perhaps when this Petition was made, there might be too much heat in the minds of men, and it is true, that heat encreaseth heat, and fire kindles fire; 'tis time for all sorts to grow cool and temperate, and to weigh and consider we are or should be considering men. This Petition was made Nemine contradicente, and undoubtedly among such a number as the Common Council, there must be men of variety of Tempers and Dispositions: But for the greatest number of the Aldermen and Common Council, think of them, we know the men, many of them; can we imagine that they had either the least ill thought

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or meaning towards the King, his Perſon, or Government, in this Petition, or the printing it. And as for the printing it, that, my Lord, ſtands upon the ſame Reaſons and Grounds: For if there be nothing ill or unlawfull in it contained, then the printing and publiſhing of that which contains nothing ill or unlawfull, is not, as I conceive, ill or unlawfull. Printing is but a more expeditious way of Writing, and is good or bad as the matter printed is good or bad. The Defendants in their Rejoinder have ſet forth their whole caſe, the Reaſons and Grounds of what the Common Council did, and the manner and intent of their doing it; all which Fact cannot be denied to be true, but is now confeſſed by the Demurrer. It hath not, nor can be ſaid, but it is well pleaded, and might have been traverſed and denied if not true: But it is confeſſed by the Demurrer to be true, and therefore that muſt be taken to be the Fact, and not as alleadged in the Replication, and then ſo taken, I ſubmit it to your Judgment.

(3.) But the next thing conſiderable is, Whether, ſuppoſing and admitting, that if done by the Body Politick, it had been a Miſcarriage, or a Crime, whether, not being done by the Body Politick, nor under the Common Seal, but by Common Council, whether thereby the Being of the Corporation ſhall be forfeit?

A Common Council in Corporations is generally a ſelect number of the Body corporate, conſtituted to adviſe and aſſiſt the Corporation in their ordinary affairs and buſineſs. There is no certain Rule nor Meaſure of their Power, wherein all the Common Councils agree. In ſome Corporations the Common Council have greater authority, in ſome leſs, according to the ſeveral authorities by the reſpective Charters where the Corporations are by Charters; or by Cuſtome, or Uſage, where the Corporations are by Preſcriptions: But in all they are a ſubſervient number of Men, conſtituted and authoriſed for particular ends and purpoſes. And in this caſe I think the Court can take notice of the Common Council no otherwiſe than upon the Record they appear to be. The Replication doth not ſay what they are, but would go in the dark, by intention and preſumption, the beſt way and method to arbitrary Determination. The Rejoinder ſaith, that the Citizens and Freemen are a great number, fifty thouſand, and more. That there hath been time out of mind a Common Council, conſiſting of the Mayor, and Aldermen, for the time being, and of certain Freemen, not exceeding 250, annually elected to ſerve as Common Council-Men, and are called the Commons of the City. That time out of mind there hath been a Cuſtome, that the Mayor, Aldermen, and ſuch Citizens, ſo elected to be of the Common Council, according to cuſtom, have been accuſtomed to make By-Laws and Ordinances, for the better regulation of the publick Markets, for appointing

times and places, and assessing and reducing into certainty reasonable Tolls, Rates, and Summs of Money, payable for Stalls and Standings, in the Market. For any thing appears upon the Record, this is all they have power to doe: Non constat to the Court that they have any other power or authority over Lands, Estates, or any thing else. Next, If this which in the Rejoinder is alleadged, of the Being and Power, be true, and so admitted, then what they did in making the Ordinance, was done by good and lawfull power and authority, and then can be no Offence: But if to make the Ordinance be an Offence, and an unlawfull Act, you deny the Custom to be good, and say, the Custome is void, and against Law, and for that Reason the Ordinance illegal. Then non constat that they had any power at all to doe any thing, and then a Common Council to advise without power to doe any Act: and if so, How can a parcel or part of a Corporation, not authorised to doe any Act, doe an Act that shall forfeit? Suppose a particular Company, as the Mercers, had done this, could this be a Forfeiture? But if to avoid this you will say, that the Court shall take notice of the Common Council of London, to have the management of the business of the Corporation belonging to them. This I think the Court cannot doe, and I cannot see how possibly they can, as a Court, judicially take notice hereof. Suppose our Question had been concerning another Corporation, could the Court then, as a Court, judicially have taken notice of the Power or Authority of their Common Council. Mr. Sollicitor in his Argument held, That there was no difference betwixt London and another Corporation, except that London was the biggest. Then put the case of any other Corporation, could the Court judicially have taken notice of their Power or Interest, without having it specially set forth? Is it possible the Court can, since they differ one from the other, as much as their Charters or Constitutions do differ, of which there is hardly to be found two in England that do agree in their Powers? If it had been of another Corporation, of necessity the constitution of the Common Council must have been set forth. If you are upon a By-law, made by any other than the Body Politick it self, must not the Power and Authority of those that made it, be shewn, and set forth in Pleading, in any case where there is occasion to use it? How otherwise could the Court judge or determine of it? So that taking the Law to be as the other side saith, that London differs not from any other Corporation; it is no where alledged in the Pleading, that they have Power to make By-Laws, for the ordering and governing the City, or that they can bind all the Corporation in sale or disposition of their Lands, or have the power of the common Seal: Therefore when the King's Counsel argue from these Powers, their Power of forfetting, they argue quite out of the Record; they have no where alleadged or pleaded what they are, or what Power they have, as they should have done, if they had

had ſo intended. So as to this particular here is nothing before the Court, nothing upon Record, to ſhew how or which way the Body Politick ſhould be concerned in theſe Acts of about two hundred and fifty of their Members, called the Common Council. Whereſoever any By-Laws or Ordinances are pleaded, the Power to make theſe By-Laws or Ordinances is pleaded, and ſo are all particular and derived Authorities, whenever occaſion to plead them, and neceſſary they ſhould be ſo: For 'tis Fact that the other ſide may and ought to be at liberty to deny it, if he ſee cauſe; and therefore if they will have it that the Common Council have abuſed ſome Power or Authority they have, thereby to forfeit the Corporations, they ought to have ſhewn it; to ſay that notice ſhall be taken, or it ſhall be intended or preſumed, is in truth a Preſumption upon the Court, as if the Court ſhould take notice of intend or preſume what the King's Counſel would have, which the Court cannot, nor will doe, more in this than in other caſes. But ſuppoſing the Court will take more notice of London than any other Corporation, and will take notice of the Common Council there, and of their Power and Authority; and I will ſuppoſe as the other ſide do, That they have the Power of making By-Laws, of leaſing, granting, and managing the City Lands and Revenues, and of ſealing with the common Seal, and that this they have by Cuſtome; Then ſurely, ſay the other ſide, they have the Power of ſurrendring and forfeiting the Corporation. If I ſhould anſwer, ſurely and without doubt they have not, this would not argue they have not; but the Argument ſhould come of the other ſide, to prove they have; they have not, nor can produce any Caſe or Opinion to prove it; and the very thought that they could is ſo new, that I believe none can be found like it. But let us conſider the nature of this Thing a little particularly, though general Diſcourſes are moſt eaſie and flowing yet perhaps a particular Enquiry may beſt diſcover. Admit that they have the Power the other ſide ſay they have; yet they are not the Corporation, but a part conſtituted for theſe particular ends and purpoſes for which they are impowered. Corporations had their Creations by Charter; that gives them their Being, and the Form, Method, and Power of Action. Suppoſe that the firſt Charter of Incorporation that was granted to London did grant, that the Citizens ſhould be incorporate, and a Body Politick, by the Name of Mayor, and Commonalty, and Citizens, that there ſhould be a Mayor, ſo many Alderuen, and ſo many of the Citizens, annually elected, that ſhould be a Common Council, and that they ſhould have Power to make By-Laws, to demiſe or grant their Lands, under the common Seal, in the name of the Corporation. If they doe any Act not within their Commiſſion, is not that void? Suppoſe a Grant made to the Common Council, would not that be void? Suppoſe a Grant made by the Common Council in the name of the Common Council under Seal, or in the name of the Cor-

poration, but not under Common Seal; is not all this void? This I only instance, to shew that their Charter and Authority is their Power and Warrant, they are to act by; did ever any man hear of, or see a Charter giving the Common Council power to Surrender the Corporation? or was it ever thought of before these days? If then no such power by the Charter given, if they cannot doe it without power given them, shew me their power, or else I think I may conclude sure they cannot Surrender the Corporation without power. But the Common Council in London that is by Custom, and their power is by Custom. Then if the Question be, what is their power? it is answered, what they have used and accustomed to doe, that they may doe; what they have not used or accustomed to doe, that they cannot doe: for if Custom and Usage be the authority, that authority can go no further than their Custom and Usage goes. Then put the Question, have the Common Council used to Surrender or Forfeit the Charter, no body can say it; what reason then is there for any man to say they can doe it? It is probable that the Common Council in London, had first their Institution from some By-Law or Ordinance, though now not to be produced, but consumed by time. But be it that, or any other imagined Commencement, can it be imagined that those that gave them their Original authority, gave them power to surrender the Corporation, or forfeit it. Suppose that the power given them did authorize them not only to make By-Laws and Ordinances for the good order and government of the Corporation, to grant or demise their Lands and Revenues, but had some general words in it to act and manage the matters of the Corporation. Is it not against all sense to suppose that that which is deputed and constituted for the well-ordering and managing of the Corporation should have power to surrender it. Then as the Counsel of the other side argue, that because they may surrender they may forfeit: By the same reason, I hope I may argue, if they cannot surrender or dispose of the Corporation, they cannot forfeit. Next, Those Acts of the Common Council are not done neither in the name, nor as the Acts of the Corporation, nor under any Seal; but do import in themselves only to be the Acts of the Common Council. The Ordinance, That is made by the Mayor, Aldermen, and Commons in Common Council assembled. The Petition is the Petition of the Lord Mayor, Aldermen and Commons in Council assembled. Their Leases or Grants are in the names of the Corporations, and under the Common Seal and the Common Council only Ministerial to the Corporation in ordering, managing and disposing all for the benefit and advantage of the Corporation, to avoid the Inconveniency of assembling the numerous Body. But that any thing that hath but a ministerial power for the service and benefit of their principal, should have power to dispose of, sell, convey or surrender, and destroy their principal, is no consequence in Law or Reason. No Deputy-

assistant,

aſſiſtant or Bayliff hath ſuch power, if he exceed his authority, his Act is void. Is it not ſo with all Authorities and derived Powers? what they doe beyond their authority cannot bind thoſe from whom they derive it. It cannot be the Act of the Corporation, for a Corporation cannot make a Petition, no more than they can make a Deed, or ſubſcribe a Writing, except under the common Seal.

Corporations cannot make a Leaſe at will, licence a Man to enter upon their Lands, or doe any like Act, but under their common Seal. Nor can they commit a Treſpaſs or Diſſeiſin but by Command precedent, or Aſſent ſubſequent under their common Seal. How then can this be their Act? There is nothing in it that imports it ſhould be theirs, nor ever intended to be theirs; it is not done by them, nor in their names, but by the Common Council, and in the name of the Common Council. If we may take notice of what is out of the Record, we know that they have in London a greater Aſſembly than the Common Council, viz. The Common Hall, wherein the Common Council are no more than others. Can the Petition of the Mayor, or Mayor and Aldermen, in their names, be taken to be the Act of the Corporation? if that cannot be, why ſhould the Petition of the Common Council in their own names be any other than their own Petition, as their Ordinance and By-Law theirs, and not the Corporations. 12 H. 7. 25, 26. 9 E. 4. 39.

The Caſe of Corporations takes notice of their Power, as Common Councils, to exclude the Commonalty and the reſt of the Corporation. The Act allows the Common Councils electing Petitions. But where is it to be found that it was ever ſaid or thought on before, that they could forfeit or diſſolve the Corporation? Rep. 4. 77. 13 C. 2. cap. 5.

(4.) But ſuppoſing all that I have ſaid againſt me: And ſuppoſing the Acts of the Common Council to be the Acts of the Corporation: And ſuppoſing thoſe Acts, viz. The making the Ordinance and Petition not juſtifiable or excuſable; Then the great Point will be, whether they or either of them are ſuch Miſcarriages or Offences in Law for which the Charter, that is the very being of the Corporation, ſhall be forfeit.

This I call the great Point, for I think it to be as great in Conſequence as ever any at this Bar, as if Magna Charta were at ſtake; for in my apprehenſion, not only London, but all the Corporations of England, and the Government of England will be deeply concerned in the Queſtion. For let us but conſider what a vaſt part of England is concerned in the Corporations of England.

1. Eccleſiaſtical or mixt, as Archbiſhops, Biſhops, Dean and Chapters, Parſons, Vicars, Univerſities, Colleges, Hoſpitals of all ſorts.

2. All

2. All the Cities and considerable Towns and Boroughs in England.

3. The very Frame of our Government is concerned; for one of the Estates of the Kingdom, viz. The Commons in Parliament, consists of Knights, Citizens and Burgesses; the Citizens and Burgesses are usually chosen by them that are Free of the respective Cities and Corporations, and where not chosen by them, yet the Elections are generally under their Power and Influence, and the Return made by them.

Perhaps also a Peerage is a sort of Corporation. Perhaps the World it self, at least this little World, will no longer be able to subsist in health than the due Order and just Temperament of the several Parts and Powers therein, are preserved, and contain themselves within their own Bounds. The taking away or Infeebling any principal Part brings a Lameness and Deformity, Pain and Disorder upon, and at length confounds the whole. The Laws answer their ends, whereof the principal is the preservation of the Government which preserves the Laws, they cannot subsist one without the other; therefore whatsoever it is that tends to the Subversion, or leaving at Will and Pleasure that which is so considerable in our Government as Corporations are, ought to be throughly considered.

The better to examine and consider this great Point: In the first place, the Reasons given on the other side are,

Object. 1. That if Corporations be not forfeitable for their Miscarriages, they will attempt and doe extravagant Acts, raise Sedition or Rebellion, and there will be no adequate Punishment to their Miscarriages.

Resp. In answer to this Reason,

1. There is no illegal Act that they can attempt or commit, but that they are under the same Severities and Corrections of Law as any other the King's Subjects not Incorporate are. Though it be true, that the Corporation it self is only a Body Politick, an invisible Body, yet the Members of it they are visible. If they as Members of that Corporation commit or doe any unlawful Act, they are punishable for it in their own private Capacities. If they make any Ordinance or By-Law to raise Money unlawfully upon any of their Members, or others, the By-Law or Ordinance is void. If they receive or collect any Money by it, the Receivers and Collectors are to answer it; they are to be sued as any other Subject. Suppose a Lord of a Mannor or Market make an unlawful Order to collect or take Money from his Tenants or Coppyholders, or unreasonable Tolls in his Markets. This Order is void in Law, and those that collect or receive any Money by it, are answerable for it, and the Parties grieved have their proper Actions and Remedies, and perhaps the Markets, or at least the Tolls may be

be ſeiſed, or forfeit for this Miſcarriage. This is the Proviſion that by Law is made againſt ſuch Exactions, and this is juſt and adequate & reaſonable. And if a Corporation make ſuch Ordinance, By-Law, or Order, and thereby there is the ſame receipt or Exaction, the Subject hath the ſame remedy, and there is the ſame Forfeiture of Toll or Market, as in caſe of any natural Perſon, or Lord of a Mannor, and the Proviſions by Law made are juſt and reaſonable, and adequate in this Caſe of the Corporation, as of the other. The like for any Offence that can be committed, it muſt be done by particular Members, and they muſt anſwer for it. And this is no new Opinion, 21 E. 4. 14. expreſs that a Mayor and Commonalty, or other Body Politick, cannot commit Treaſon, although all the Commonalty doe commit Treaſon, every of them is a Traitor in his own perſon: I might cite other Authorities to this purpoſe, but they have been already cited by Mr. Recorder in his Argument; and though the Counſel for the King would make theſe Books to be but ſome ſlight Opinions, yet unleſs they could ſhew ſome Authority, Book, or Caſe to the contrary, their deſpiſing or little valuing what they can find no Anſwer for, will not render the Authority and conſtant Opinions of our Books of leſs eſteem than they ought to be. 'Tis no excuſe if they doe an unlawful Act, that they are Members of a Corporation, or did it as a Corporation. No body can ſay this will excuſe them; ſo, that notwithſtanding their being a Corporation, they are ſubject to the Law, be the Offence Treaſon, Sedition, or any other Crime or Offence as, any other the King's Subjects are; every particular Member that acted or committed that Offence, is anſwerable to the Law for it. The particular Members that commit the unlawful Act, and all that act under their Authority, are ſubject to the ſame Law as all other the King's Subjects. And therefore this reaſon, that elſe there will be no Puniſhment upon them adequate to the Offence, and conſequently a Miſchief and Inconvenience is but a ſhadow, and nothing proportionable to the Miſchiefs and Inconveniences attending the poſition of a Forfeiture of the other ſide. But conſider the Injuſtice that would be of the other ſide, if this ſhould be ſo; we know Aſſemblies determine their Act by the major Vote, and great ſtruggling there is, as we too frequently ſee in their Debates and Reſolutions, and carried by majority of one or two Votes, ſometimes by ſurprizes and undue management, ſometimes by fear and terror: Suppoſe an evil Act ſo carried or managed, is it reaſon that all the whole Corporation ſhould be hereby forfeit? and thereby all other men to whom they owe any Debts, muſt loſe them, and the many Intereſts and Livelyhoods depending upon the Corporation, the Cuſtoms, Courts, Offices, and Privileges belonging to it, endleſs to enumerate, ſhall all be undone and deſtroyed.

Obj.

Obj. 2. The next Reason that hath been given is, That it is a general Rule in Law, that the abusing or misusing of a Franchise, is a Forfeiture of the Franchise.

Resp. 2. This is true in the sense that the Books do say it; for if a man misuse or abuse a particular Franchise, he shall forfeit that particular Franchise; but he shall not forfeit any other except it be depending upon and incident to it. And the Cases cited prove nothing farther.

22 Ass. p. 34. Br. Fran. 34. 8 H. 4. 18. Rep. 9. 96. b 24 E. 4. b Inst. 2. 43. That when a man hath divers Franchises not depending one upon another, and misuseth one Franchise, he shall not thereby forfeit the rest, but only that which he misuseth. And therefore the Cases cited; Where the Abbat of Crowland and the Abbat of St. Albans had Franchises of Custodies of Gaols; one would not be at the cost of a Commission of Gaol-Delivery, the other did detain in Prison after legal Discharge, and Fees paid. This was a misuser of those Franchises and Forfeitures. So also perhaps if there be a Franchise that hath Incidents to it; as, Pypowders to a Fair, Pillory to a Leet. An abuser of the Incident, as the Court of Pypowders, or the not having a Pillory, may forfeit the Market or the Leet. If the Lord of a Market take outrageous Toll, he shall forfeit the Market. But doth this prove, that if a Corporation have Fairs, Markets, Gaols, or Leets, and misuseth any of them, that the Body Politick, the Corporation shall be forfeit. If this be so, the Abbats, they being Corporations, in the cases of the Abbat of St. Albans, and Crowland, should have forfeited not only the Liberties of having Gaols, but the very Corporations, or Bodies Politick, of being Abbats; a conceit never yet imagined. Can you say the City of London is either dependent or incident to the Markets; or the contrary, that the Markets are incident or dependent upon the Corporation, that they cannot be one without the other? Can this be said? If this cannot be said with reason, how can then the taking these Tolls admit they were outrageous, and a Forfeiture of the Market forfeit the Corporation? The making the Ordinance, supposing they made it, is but the mean by which they took it. Your Books only prove the abuse of a Franchise, a Forfeiture of that Franchise, or Incidents to it, and no other: But the Inference in this Case is not the Forfeiture of that particular Franchise; but of the being of the Corporation that owned the Franchise: which is a plain Non sequitur, unless you say the Corporation is incident to the Market. Arguments from general Rules are the most fallible, especially in Law; and that this is such, I hope most plainly to shew in the distinguishing the different nature of Franchises; which I shall doe presently, only taking in my way

Stat. West. 1. cap. 31. Inst. 2. 219.

their

their next Reaſon that they offer, and anſwer both together: which is,

Obj. 3. That a Corporation is a Franchiſe; that it commenceth by Grant, and therefore Forfeitable and Surrenderable as other Franchiſes are; and if they be Surrenderable, then alſo are they Forfeitable.

Reſp. I do agree, that Franchiſe is a large word, it is of the like ſenſe of Liberty or Privilege. Therefore in Quo Warranto Franchiſes, Liberties, and Privileges ſeem to be of the ſame ſenſe. To be a Subject born, and to have Liberty and Privilege of a Freeman, and no Villain, is a great Franchiſe; and therefore in Law, when a Villain is made Free, we ſay he is Infranchiſed, he hath the Franchiſe, Liberty and Privilege of being a Freeman. An Alien he is made Denizen by Letters Patents, a Perſon attainted is Pardoned by Letters Patents, and a reſtitution in blood granted and made a new Creature. By theſe Grants the Alien and the Perſon reſtored have ſuch Franchiſes Liberties and Privileges granted them: that though before they were not capable to take hold, or enjoy, or Act as natural born Subjects or Freemen, yet hereby they have ſuch Capacity granted: Next, I think it will be granted that this Franchiſe, Liberty, Privilege, or Capacity, is not ſurrenderable or forfeitable, except only in Caſes of Treaſon or Felony, where they forfeit their Lives; by theſe inſtances this is proved, That it is no true poſition that whatſoever is grantable is ſurrenderable, and if ſurrenderable forfeitable; which is one of the Reaſons given by the King's Counſel, why a Corporation is forfeitable, for theſe Franchiſes or Privileges are by Grant, and yet not ſurrenderable or forfeitable; and this alſo ſhews that Arguments general and from general Rules are moſt fallible, and fit only to take weak apprehenſions. But next conſider, what it is to be a Body Politick or Corporation. A Body Politick is framed and conſtituted in ſimilitude or likeneſs of a natural body, with Capacity to take hold and enjoy, and act as a natural body, and can no more ſurrender or forfeit his being while the members of that Body are ſubſiſting, than a natural body can while alive. It is only a Capacity framed and created in a multitude to be, and act as one perſon, they are incorporate and made one Body Politick that have Power, and Capacity or Franchiſe of acting taking holding and granting: this is their Franchiſe, admit it ſo, but differs from others. Franchiſes and Liberties of all other Natures are Eſtates and Inheritances grantable and conveyable from one to another as other Eſtates are, this is no ſuch thing grantable or transfertable; other Franchiſes and Liberties affect the King's Subjects, and are Privileges claimed, wherein the King and the reſt of his Subjects not claiming the Franchiſe, are more concerned than in this of being a Body Politick; for other Franchi-

ses either convey some Profit from the King, as Felons, Goods, Waifs, Estrays, Wrecks, or the like: Or affect his Subjects, as Courts, Gaols, Returns of Writs, Fairs, Markets, and the like. But this of being a Body Politick, is only a Capacity to be a Person capable of having and holding what may be granted unto it; and of granting and acting as a natural Body, and affects the King, or other his Subjects, no otherwise than giving Capacity to take, hold and enjoy what they can get as other Persons capacitated may. Other Franchises, Liberties and Privileges are distinct and separate Estates, and if any one be forfeit, as it may for misuser, the rest are not; except incidents and appurtenances. But if the being of a Corporation be forfeited, All their Estates, Lands, Goods and Chattels are gone at once: So that though you admit and call this a Liberty or Franchise, 'tis nothing like in its nature to those things generally known and understood by the name of Franchises or Liberties; and general Sayings are generally to be understood of such things as are generally so taken and called. If then there be such great and apparent difference betwixt this of the being a Body Politick, supposing it being in a general and large sense, a Franchise, Liberty or Privilege, and other particular Franchises, admitting that which is said, that the Misuser of a Franchise is a Forfeiture, holds generally true, yet it is not in every particular true, where there is such apparent difference and reason to distinguish as betwixt the being of a Corporation or a Body Politick, which is only a Capacity, and other particular Franchises, which are Estates; there is also apparent reason to distinguish betwixt one and the other, they being so much differing one from the other in nature and reality. But next, That this was never taken in Law to be such a Franchise, Liberty, or Privilege as was comprehended under the general meaning of Franchise or Liberty.

6 E. 1. Inst. 2. 278. By Sta. of Glost' Writs were to go to all Sheriffs forty days before the Eire of general Summons, for all to come in at the Eire to claim their Privileges; and the second day of the sitting of the Justices in Eire a Proclamation made to the same purpose. In the Inst. 2. 281, 282. Comment upon that Statute it appears, that if the party did not appear, his Franchises were seised into the King's hands, Nomine districtionis, and if not replevied sitting the Eire, they were forfeit or lost for ever. If the party did appear, and did not claim, then they were lost for ever. In all the Proceedings in Eire, there is no such thing can be found: That the Corporations did come in and make Claims to their being Corporations or Bodies Politick, or that ever any were seised if it be seisable into the King's hands, or was forfeit for not Claiming. Fulher and Heyward's C. Palm. 491. It appears, that the Dean and Chapter there Surrendred their Charter, and all their Manno[r] Lands, Possessions, Privileges, Franchises and Hereditaments, Spiritual and Temporal, and this with intent

to

to Surrender, that there might be a new Corporation erected; as is recited in the Letters Patents of new Erection. In this Caſe, Rep. 3. 75. And. 2. 120. Jones 168. reſolved, that by this Surrender the old Corporation was not ſurrendered. This Judgment doth conclude, and muſt be given, either becauſe by the word Franchiſe, and the other general words, the Franchiſe of being a Corporation was not comprehended; or if the word's ſufficient, and did compriſe it, that it could not by Law be Surrendered. This I think ſufficiently ſhews that Corporations were in Law as Perſons natural are, and in like manner claimed, and that the being a Body Politick or Corporation, was not to be claimed, compriſed, or meant within the general words, Franchiſes, no more than the Liberty or Franchiſe of Denizen, or Manumiſſion. Next, No inſtance can be given of any ſeiſure of any Corporation or Body Politick for any Forfeiture, Seiſure of their Liberties, or putting Officers upon them, is quite another thing, as I ſhall ſhew preſently: So that theſe general Sayings in Law-Books, that Miſuſer of a Franchiſe forfeits the Franchiſe; neither in Law or Reaſon extends to the being of a Body Politick or Corporation, but is applicable only to particular Franchiſes of other natures; and the other reaſon, that that which is grantable is forfeitable, is as fallacious as before appears.

3. For the Records cited to prove that the Corporation or Body Politick may be Forfeited, I will ſtate thoſe that are moſt Effective, and doe them right therein.

Johannes Dennis, Mayor of Sandwich, and three more, were attached to anſwer Domino Regi de placito tranſgr' & unde Robertus de Stokho, Sheriff of Kent, qui ſequitur pro ipſo Rege, complains that he had ſent his Bailiffs (naming them) to make Execution of the King's Writ, in Villa de Stanore, qui eſt Barona domini Regis, and that the Defendants, with Swords drawn, took away the King's Writ, and trod it under their feet, and would not ſuffer it to be executed, unde dicit quod deterioratus eſt, & damnum habet ad valentiam 2000 Marks. The Mayor appears, and pleads to the Juriſdiction, that he ought not to anſwer this matter, except in the Court of Shipway. The Sheriff replies, That Stanore is the King's Barony, belonging to the Barony of St. Auſtins, and relyes upon a Record before Juſtices in Eire, where an Amerciament upon that Vill' was formerly ſet. The Mayor refuſeth to plead over. Then a day is given over: Then 'tis entred thus, P. 9. E. 1.

Poſteaq; coram Domino Rege & ejus Conſil' Quia Barones del' Cinq; Ports nec aliqui alii in Regno noſtro poſſint clamare talem libertatem, quod non reſponderent Domino Regi de contemptu ſibi fact' ubi Dominus Rex eas adjornare voluerit; Et quia predict' Barones non protulerunt aliquas Chartas a

Regibus conceſſis, in quibus non fuit excepta Regia Dignitas, conſideratum eſt quod reſpondeant; & quia le Defendants would not answer any other where than in Shipway, conſideratum eſt quod habeantur in defenſionem pro convictis de predict' Tranſgr' & Contempt'. Et quia the ſaid John Dennis is convicted of the ſaid Offence, and the fact of the Mayor, in thoſe things which touch the Commonalty, is the fact of the Commonalty, conſideratum eſt quod Communitas de Sandwich amittat Libertatem ſuam, &c. Then follows, Poſtea, in preſentia of the Biſhop of Bath and Wells, then Chancellour, and others, cum Aſſenſu Regis, an Agreement betwixt the Abbat of St. Auſtins, the men of Stannore and Sandwich, de omnibus contentionibus.

And then goes a long Agreement betwixt the Abbat and the Men of Sandwich and Stannore, concerning their Jurisdictions and Courts:

Et ſi aliqua pars contra concordantiam illam ire vel facere, alia pars habeat ſuam recuperare per breve Domini Regis de Judicio exeunte de iſto Recordo. Et pro hac predict' homines vadiant predict' Abbati 100 Marks, which the Abbat remits for 10 doliis Vini, pretii 30 Marks, to be paid at the Feaſt of St. John the Baptiſt.

This is the Record at large; and for the Extract in the Collections at Lincoln's Inn, whether it be of this Record, or any Execution that went out upon it, non conſtat: But that I think it could not be upon this Record; for the Record is not 30 Marks annuatim, as the Abſtract is, and the Entry of the videtur at the concluſion, quod Judicium extendit contra Barones, Quinque Portuum, & eorum Libertates, ut mihi videtur, that is not my Lord Hales his Note, nor doth it appear whole it was. Out of this Record how can a man infer that a Corporation ſhall be forfeit for the Miſcarriage of the Mayor, or Officer, how doth it appear from hence, that they ſhould loſe or forfeit their being a Corporation. By amittat Libertatem all that is meant thereby is their Liberty in Stannore, or the Liberty they claimed to be impleaded in the Court of Shipway, and the Note in the Extract, videtur quod Judicium extendit verſus Barones, muſt be, I think, taken to be as to their Liberty in Stannore, or to be ſued only in the Court of Shipway. I have taken the more notice of this Record, becauſe it hath countenance of a judicial Proceeding; but as to all the other Records cited,

6 E. 2. r. Clau. Membr. 5. A Writ to the Sheriff of Glouceſter, reciting, That the King, for injuries and contempts done by the Mayor and Commonalty of Briſtol, the Liberty of that Caſtle by Bartholomew de Baddleſmere, Cuſtos of that Caſtle into his hands had ſeized. The Writ commands the Sheriff,

Sheriff, that the Custos should have the Execution of Writs, as the Mayor and Bailiffs used to have. And the times of Henry the Third, Edward the First, Edward the Second, and Richard the Second, there were frequent Seisures of the Office of Mayor, and the Kings did put in a Custos in the place of Mayor, as made a Mayor, and these are called Seizures of Liberties.

King Henry the Third put in a Custos over London, which continued till the 54th of his Reign, and then taken off, and the City restored to its Election. 49 H. 3.

Edward the First put in a Custos, and continued so to doe till the 25th Year of his Reign, and then taken off. 25 E. 1.

The 14th of Edward the Second a Seisure of the Office of Mayor by Henry de Staunton, and his Fellows, Justices in Eire in the Tower, and Mayors put in by the King till the 20th of Edward the Second, and then restored: But for that of Richard the Second, give me leave to digress, and give you the state of it out of the City Registers, which are more full than these cited.

A Writ from the King to the Mayor, Sheriffs, and Aldermen, commanding them to come with twenty four principal Citizens, before the King and his Council at Nottingham, in crastino Sancti Johannis Baptist' tunc prox' fut', and to bring sufficient authority from the Commonalty to answer such things as should be objected. They appeared, and had a Letter of Attorney, ubi pro diversis defectionibus in Commissione suo sub communi Sigillo, & aliis de causis, the Mayor and Sheriffs were discharged of their Offices, and committed diversis Prisonis; and afterwards, the first of July, Sir Edward Dallingrigg, made Custos by the King, came to the Guildhall, and his Commission being read, he was sworn before the Aldermen, secundum quod Majores ante jurare solebant; the King also made the Sheriffs, and they were also sworn. This is also entred in the City Register, Lib. H. fol. 270. b 16 R. 2. July 22. Lib. H. fol. 269. b City Reg.

It appears that the King first swore the Custos, and the Sheriffs, to be true to him, and also turned out the Aldermen. And that the Proceedings were before the Duke of Glouceſter, and other Lords, by a Commission, to enquire of all Defaults in the Mayor and Sheriffs, in the well governing of the City, awarded upon the Statute made by the King's Grandfather, and that they were convicted by their own Confession, and thereupon the Liberty of the City seised. 16 R. 2. r. Cl. M. 30. Ind.

The Pardon and Restitution entred, and thereby 'tis recited, that the Proceedings were upon the Statute, and the Judgment was, That for the first Offence they should forfeit one thousand Marks; for the second 19 Sept. 16. R. 2. Lib. H. fol. 272. a ubi supra.

second two thousand Marks; and for the third Offence, that the Liberty should be seized.

The Statute 28 E. 3. cap. 10. enacted, That the Mayor, Sheriffs, and Aldermen of London, which have the Governance of the same, shall cause the Errours, Defaults, and Misprisions in and about the same, to be corrected and redressed from time to time, upon pain, that is to say to forfeit to the King for the first Default one thousand Marks, the second Default two thousand Marks, and for the third Default the Franchises and Liberties of the City shall be seised into the King's hands. And that the Tryall of these Defaults shall be by Enquests of forein Countries, and the Pains levied upon the Mayor, Sheriffs, and Aldermen. Upon this Statute were the Proceedings of R. 2. grounded. The other side have likewise much relied upon another Seisure made of the Liberties of the City of Cambridge.

5 R. 2. Rot. Par. N. 45. Inst. 4. 228. A great Riot committed by the Town, upon the Universlity, heard in Parliament by way of Petition, and form of Articles exhibited by the Scholars against the Mayor and Bailiffs. Upon reading of which it was demanded of them what they could say why their Liberties should not be seised: After many Shifts they submitted themselves to the King's Mercy. The King thereupon, by common consent in Parliament, seised the same Liberties into his hands, as aforesaid, and then granted divers Liberties to the Universities, and certain Liberties the King granted to the said Mayor and Bailiffs, and encreased their former. These are the most substantial; it would be too tedious to repeat all, for there have been in those days, but not since, many like Seisures of Liberties, as these; only general, but nothing particular to our purpose, and though not cited, I shall also mention those in Crook.

Cr. 1. 252. Tyndals Case. Certiorari to the Mayor of Fith; they disobeyed the Writ, and gave scurvey Words; and thereupon Mr. Noy cited two cases of Seisures of Liberties. The Bishop of Durham had contemned the King's Process, and imprisoned the Messenger. An Information exhibited against him, the Offence proved; adjudged he

33 E. 1. rot. 101. should pay a Fine, & quod capiatur, and should lose his Liberties for his time; because Justum est quod in eo quod peccat in eo puniatur. Another

21 E. 3. rot. 46. in Banco Com' a Prohibition awarded to the Bishop of Norwich, and he excommunicated the Party that brought the Writ; the Party brought his Action, adjudged against the Bishop, that his Temporalties should be seised till he absolved the Party, and satisfied the King for his Contempt, and that the Party should recover 10000l. Damages. I answer to them,

1. They

1. They were all above three hundred years ago, except that of 16 R. 2. which is above two hundred and ninety, and no ſuch thing ever done ſince, what ſtreſs or weight can be given to ſuch Proceedings? To what Rules of Law, ſince known or practiſed, can we bring theſe Proceedings? Are they now legal Precedents for the like things to be done? The Writs out of old Records for the Ship-money, and the Knighthood-money, had as good Records to warrant them, and much more plain to the purpoſe than theſe. The Precedents of Edward the Second, and Richard the Second, either of their Lives, or of their Deaths, or of the Lives or Deaths of ſome of the Judges of thoſe days, ought, as I conceive, to be no Examples. And for H. 3. E. 1. E. 2. and R. 2. and thoſe times, they were times of great troubles and diſorders, and what was then done is no Rule or Precedent for this Court, or any other Court of Juſtice, to go by, unleſs by later times allowed or approved. No Law-book or Report of any judicial Proceedings, either of E. 2. or of E. 3. or any later Book of Law that I have yet heard of, or met with, (and I doubt not but if there had been any, the King's Counſel would have made uſe of them,) hath ever given ſo much credit or countenance to theſe Proceedings, as to take any notice of them. To make uſe of old Records or Precedents, the Grounds or Reaſons whereof cannot now be known, to ſubvert any Law or Government eſtabliſhed, is neither adviſable nor commendable. But for anſwer to them:

Reſp. As to that of 16 R. 2. that you ſee is grounded upon the Statute 28 E. 3. c. 10. and can ſignifie nothing to the preſent purpoſe, for there, according to that Statute, they condemn the Mayor, Sheriffs, and Aldermen upon their Confeſſion, that they had miſgoverned the City. The Mayor and Sheriffs being committed to Priſons, and this done before Dukes and Earls, by ſpecial Commiſſion to that purpoſe appointed, and convicted by their confeſſion, for the firſt, ſecond, third Offenſe all at once, Is this of good Authority in Law? And for the others, that of E. 2. was before Juſtices in Eire at the Tower, the Office of Mayoralty ſeiſed into the King's hands, and replevied from year to year. And that Seiſure that was made by King E. 1. for what Reaſons or Grounds, or by what ſort of Proceedings, doth not appear; all that doth appear of it is, that de facto Cuſtodes and Mayors were put upon the City, but quo jure who can tell. We know theſe times were times of trouble, in the Barons Wars.

The Barons, Simon Mountford, Earl of Leiceſter, being their General, faught a Battel with the King at Lewes, and took the King and Prince Edward the firſt both Priſoners. 48 H. 3.

The Barons differing among themſelves, and the Earl of Glouceſter joined with the Prince, who 49 H. 3.

got

got out of Prison, another Battel was fought at Evisham, and the great Earl Mountford slain; and then at Winchester by Parliament all his Party and the Liberties of the City of London seised, and in such times as these, and which followed in E. 1. E. 2. and R. 2. it is not to be marvelled if there were many Seisures and Custodes put on the City, 'tis more a marvel they were not destroyed. The Statutes made in these times, shew not only the Disorders, but that the Liberties were greatly Infringed, or else there would not have been Statutes to confirm them; whether the Infringing or Seising were the Cause or Effect, is hard to know; but just before in those times there were undoubtedly many extravagant Acts of all sides, which produced Magna Charta, made the 9 H. 3. for confirming of the Liberties and Privileges, not only of London, but of all other Towns: and after these times, in the three Reigns of the three succeeding Kings, how many other Statutes for confirming the Liberties and Privileges of the Cities and Towns were made 1 H. 4. cap. 15. The Penalties and Forfeitures imposed by the Statute 28 E. 3. cap. 10. upon the City of London put into the same Condition with other Cities and Boroughs as to Penalties and Seisures.

A Statute confirming to all the Cities and Boroughs, the Liberties and Franchises which they by former Grants or Confirmations had, viz. 4 H. 4. Cap. 1.

Confirmed in like manner, by 7 H. 4. Cap. 1.

Again confirmed in like manner, by 3 H. 5. Cap. 1.

Again confirmed by Statute of 2 H. 6. Cap. 1.

By which it appears what a sense and memory they had of the Seisures that had been of their Liberties and Privileges, that they never thought them sufficiently confirmed; but they were sufficiently confirmed; for from the time of R. 2. to this day we do not find any Seisure of any Liberties or Franchises, or Custos made or put upon them. That which was in those days of Violence done, shew them the worst of times, but are no Precedents for the best. But next,

Supposing and admitting these Records of these times of good Authority, and as authentick Precedents as can be, they are so far from proving against me, that I hope to make it most plainly to appear, that they are strong and plain Authorities and Evidence against them, and for me.

It is ordinary in Disputing or Arguing to lose the point disputed or argued. That I may not commit so great an Error, but may shunne and make plain what I have affirmed,

Give me leave to look back to the Information and Replication, and from thence to make the Points that we argue single, clear and open.

The Information that saith that we usurp'd upon the King to be a Corporation and Body Politick, but in truth are none.

The Barr sets forth the title to be a Corporation by Prescription time out of mind.

The

The Replication that endeavours to avoid the Bar, by allowing that we were once a Corporation lawfully; but that by our Miscarriages, we have forfeited our being a Corporation, and thereby became none, and after that usurp'd to be one.

So that, what which the other side maintains, is, That by our misdemeanors we have committed a Forfeiture of our old lawfull and rightfull Corporation. This I deny; the Affirmation is upon them to prove, and they producing no Record that expresses any such Forfeiture of a Corporation, but only Records generally saying, that the Liberties should be Forfeited or Seised, the question is, what the meaning is in these old Records of Forfeiting and Seising Liberties. Mr. Attorney was pleased to take it, and so did Mr. Solicitor, as I think, that Forfeiting and Seising were much one. I shall not dispute it; but whether in any of those Records the Corporation or Body Politick were by these words taken to be forfeited. Mr. Attorney was so carefull to avoid the Consequents of a Forfeiture of a Corporation, which are so great and destructive, that he would not by a Judgment in a Quo Warranto against a Corporation have the Corporation determined, no more than he would by the Forfeiture ipso facto have it determined, but that there should be some Seisure into the King's hands; but what that is, or how to be understood, I cannot imagine. For if the Corporation be not to be dissolved and determined, in whom should it rest or remain after such Forfeitures, or during such Seisure, shall it after Forfeiture remain in the same Persons that it was in, shall it subsist, live and act as before? or shall it be in limbo Patrum, or in Nubibus? Is a Corporation transferrable to any other Person or Persons? Can a Corporation be conveyed or transferred? that is impossible, and so it appears in the Dean and Chapter of Norwich Case, and Fulcher and Heyward, and 1 Inst. in the Case of the Pontage Ancestrall before cited. That a Corporation is not transferrable from one Body or Men to another; therefore the King cannot possibly have it, nor can he grant it. Ay, but saith Mr. Attorney, it shall be seised, and in the King's hands; what is meant by these words? how can it be in the King's hands, if not transferrable? Next, What shall the King doe with it, shall he grant it to others? No, that is impossible, by the Cases cited, it is appears the King may make a new, but he cannot grant an old Corporation, because not transferrable. Then if he cannot grant, if it be not transferrable, if a Corporation or Body Politick be by Law framed in similitude of a natural Body, then it is not more transferrable than a natural Body is. The Body Politick cannot be taken out of the hands of the Persons incorporated. From hence then, if this be so, it will follow of necessity that the Corporation, if it cannot be transferred to the King, or by the King's Grant out of the Persons in whom it is to devest, it must remain where it is, or be dissolved. Next, that which I shall shew is,

That by the words forfeiting and seising Liberties in those old Records, it cannot be meant forfeiting and seising a Corporation or Body Politick they still continued. But that which is the true sense of these words, Forfeiting and Seising Liberties in those Records was, if the abuse or misuse were of a particular Franchise, as of Courts, Pilons, Markets, or the like, the King had them forfeited to him. If the abuse were by a Corporation, they acted by their active Parts, by their Mayors, Bailiffs, Sheriffs, Coroners, or the like; the King seised these Offices, turned the Corporation Officers out, and put others into their Places. This was the Course in the Eires, where these Seisures in those days usually were. But for seising Corporations as forfeit, there hath been no instance of it in any time, but the contrary is most evident. For the Corporations, notwithstanding the supposed Forfeitures or Seisures, remained still in being; and this is evident even to sense. The Seisures that have been mentioned, have been of London, Bristol, Gloucester, Cambridge and Cinque-Ports, Ipswich and Winchester.

1. First, I offer to your Consideration, whether these Cities of London and Bristol, Gloucester, Cambridge, and also the Cinque-Ports, ever since have not continually in all Pleadings, Claims and Titles, made themselves a Title by Prescription; Are they not by Prescription to this day? Do they not claim their Markets, Tolls, and all their Privileges by Prescription? Do not the Acts of Parliament that immediately follow these Seisures made by H. 4. H. 5. H. 6. in the times succeeding, all confirm their Privileges, not a word of granting new Privileges, but confirm the old; which shews plainly, that in those days the Corporations were not thought or imagined to be determin'd or dissolv'd.

By these Seisures or supposed Forfeitures, the enjoyment or possession for the space of three Hundred years, is evidence sufficient of their remaining and being Bodies Politick by Prescription, which they could not be, if they were forfeited as pretended. For by Forfeiture, they must mean the losing their Corporation, or being dissolved; no other sense can be, or ever was of Forfeiture; Could they forfeit them, and yet keep them? Could they lose them, and yet have them? if they could not, then 'tis plain that since they always have had them, they never forfeited or lost them. But for farther Evidence hereof, I shall make most plainly to appear, That during the very times of these Seisures, the Corporations remained and acted as Corporations; and that at that time, it was never thought or imagined that during the Seisures the Corporations were forfeit; all that was done, was, that the Election of their Mayor, or of their Sheriff was de facto taken from them, and either a Custos, or a Mayor, by the King put over them, and continued till those Kings pleasures were over, and then they chose their own Officers again; But no thought then of forfeiting the Corporation. By the City Books, as well as

as Records, this is moſt evident. The putting a Cuſtos by King E. 1. continued for the ſpace of Eleven years, from the 15 E. 1. to the 26 E. 1. and then they choſe their Mayor again. By the City Books it appears, that their Court of Huſtings all along continued, as at other times, Aldermen all along. Lib. A. fol. 50, 51. 135.

Radulphus de Sandwyco Cuſtos Civitat' London, Henricus le Walleys, and others, Aldermen (naming them) & univerſales Communia ejuſdem Civitatis, make a Conveyance of an Houſe to John de Bangwell. 18 E. 1.

The Court of Aldermen holden before the Cuſtos and Aldermen. 18 E. 1. Lib. A. fol. 110.

With the King's Remembrancer in the Exchequer, Cives London venerunt coram Baronibus & preſentaverunt Johannem de Canluar' & Willielmum de Betoyne ad reſpondend' pro Civitat' predict' & Com' Middleſex, de his quæ ad Officium Vicecomitis pertinent, & ad hoc faciend' preſtiterunt Sacramentum. 16 E. 1. r. 1.

Ibidem, The Preſentment and Swearing two other Sheriffs. 18 E. 1. Ro. 1.

Ibidem, The like. 21 E. 1. Ro. 3.

Ibidem, The like. 23 E. 3. Ro. 3.

Auby le Artheir attachiatus fuit ad reſpond' Communitat' Civitat' London' de placito, for that he, being no Freeman, Merchandized in the City. 21 E. 1. Lib. C. fol. 19. b.

Another like Suit againſt an Un-freeman. Lib. C. fol. 7. b

A Writ of Right in the Huſtings, brought by the Corporation. Communitas Civitat' London per Radulphum Pecocks Attornatum ſuum petit verſus Hugonem Epiſcopum de Bedlam unum Meſſuagium, &c. 22 E. 1.

All the Aldermen, and twelve Citizens were called before the King and his Counſil, and the King reſtored them the Election of their Mayor, and they choſe Henry de Gabeys Mayor. And on Monday following comes the King's Writ, whereby the King for good Services, Reddidimus & Reſtituimus Civibus London Civitatem una cum Majoritate & libertatibus ſuis quas certis de cauſis dudum capi fecimus in manum noſtrum. So that hereby it moſt evidently appears, the Corporation was not forfeit, loſt, or diſſolved, only a Cuſtos put over them which acted in the place of Mayor; and when removed, they choſe their Mayor again. 26 E. 1. Lib. B. fol. 38.

The Liberties not forfeit, only ſeiſed into the Kings hands; ſo ſaith the Writ dudum capi fecimus in manum noſtrum. The Record of Cambridge I have looked upon, it plainly appears in it, that the Corporation was not forfeited and diſſolved, as you ſuppoſe. For it appears, that when they submitted to the King to doe with their Franchiſes what he pleaſed; yet it was ſalvo to the Mayor and Bayliffs, their reſponſe to all other Matters. And afterwards, at the ſame time, the King grants to the ſame

Mayor and Bayliffs divers Liberties, by which it appears that the Corporation was not forfeit, but ſtill in being, notwithſtanding the Seiſure and Forfeiture.

14 E. 2. The Seiſure that was by King Edward the Second, was in no ſort any Forfeiture or Determination of their Corporation; but either under a Cuſtos, or under a Mayor put in by the King.

Lib. E. fol. 11. b The Cuſtos, Aldermen, and Commonalty appeared, and turned out ſome of their Aldermen.

Lib. D. fol. 6. They choſe and ſwore their Sheriffs, and by this time they had a Mayor again; but the Office of Mayoralty, granted them by the King.

16 E. 2. Lib. E. fol. 146. The King grants to Nicholas de Farringdon, the Office of Mayor quamdiu nobis placuerit.

20 E. 2. They had a Writ reſtoring to them the Office of their Mayor again.

16 R. 2. Then for the Seiſure of R. 2. that continued but from the 22d of July unto the 19th of September following; and the form or colour of Law that they had for that, was the

28 E. 3. Statute of Edward the Third; and the Cuſtos put in ſworn at Guildhall, and took the Oath of the

Lib. H. 269. b. 16 R. 2. Mayor, as appears in the Book which I cited; where it is mentioned to be upon that Statute.

But for farther Evidence,

4 E. 3. rot. 2. In the Treaſurer's Remembrancers Office in the Exchequer, in Bago de Quo Warranto in Itinere Northampton & Bedford, Quo Warranto verſus Villam de Bedford; in that Record are theſe things: Firſt, That the Village of Bedford had not at the laſt preceding Eire made claim of divers Liberties, and thereupon in that Eire adjudged, quod omnes Libertates non clamat' capt' fuiſſent in manus Domini Regis, and had not been replevied, but Corporation not ſeiſed. Thereupon the Corporation offer a Fine of 8 Marks to the King, pro licentia clamandi their Liberties, and admitted to fine: But then it appeared, that the Mayor, and the Coroners had ſat in Judgment, and condemned men for Felonies committed out of the Juriſdiction; and thereupon

Conſideratum eſt, quod predict' Libertas de Infangtheiſe, & Officia Major', Ballivorum, & Coronatorum ejuſdem Ville capiant' in manus Domini Regis. Sed quia cætere Libertates & conſuetud' Ville predict' abſque Miniſtris pro communi Utilitate Populi ibidem nequeant conſervari, the Court puts Johannem de Tound Cuſtos, Johannem Wymound and Richardum Rounds Baſtiffs, and Nicholas Aſtwood and William de Knight Coroners, who are all ſworn to execute thoſe Offices, and to anſwer the King the Profits.

Hereby

Hereby it appears, that the courſe was not to forfeit or diſſolve the Corporation. They never were ſo unreaſonable; for hereby all their Lands and Goods, and all the Debts owing by them, or to them, would all be loſt: All they did was, they put in Officers to preſerve the Corporations. So that I think there is nothing more plain, that though the Liberties were ſeiſed, and that Officers, Cuſtos, or Mayors, were put upon them; yet the Corporations, or Bodies Politick, or their Liberties, were not forfeit, or determined: If they had been either forfeited, or determined, could the Writs of Reſtitution have ſet them up again? The old could never be reſtored or ſet up again, but by Act of Parliament; they might have had new Charters, and have been made new Corporations, but the old could never have been reſtored, if once forfeited, as now imagined. So that the Point betwixt us is, Whether the Records of E. 1. E. 2. and R. 2. of Forfeitures and Seiſures of Liberties, ſuppoſing the Cauſes or Offences for which they were ſeiſed were very great and provoking, as in all probability they were, do prove that thereby the Corporations were forfeit, diſſolved, or determined? It appears they were not forfeit. You can never avoid it. If abuſing the Franchiſe or Liberty of being a Corporation be a Forfeiture, as you affirm, and that they were ſeiſed for being forfeit; then the Offences that were committed by theſe Corporations in thoſe Princes times, were Forfeitures, and conſequently the Seiſures diſſolved the Corporations. They could not forfeit and loſe their Corporations, and yet keep them. And that they ſtill had their Being, is moſt evident by the Records of thoſe times, ſhewing, that they acted, and enjoyed their Corporations under thoſe Seiſures, only a Cuſtos inſtead of a Mayor, all other things the ſame. That they have in all Ages ever ſince been allowed to be Corporations by Preſcription, never denied or queſtioned. That the Acts of Parliament immediately following, confirming their Privileges, never queſtioned their having them. Never any thoughts of making void any Forfeitures by theſe Acts, or any new Grants, but always pleaded by Preſcription. Theſe things plainly ſhew, that the Offences committed in thoſe times did not forfeit the Corporation; and all that dark Authority they have out of thoſe Records is directly againſt them, proves only that theſe Abuſes gave only Cauſe of Seiſure of ſome Offices, but no Forfeiture of the Corporation, that ſtill continued.

Having thus anſwered thoſe old Records, and ſhewn that they are of Authority for me againſt them. And ſince it hath been ſtirred in this Caſe, whether a Corporation, or Body Politick be ſurrenderable or not? And inſiſted upon by the other ſide that it is, and from thence an Argument drawn to prove, that if ſurrenderable, 'tis forfeitable. Whether it be ſurrenderable or not, perhaps is alſo doubtfull, that I think a man cannot argue from it any thing. Firſt I am ſure there is no great reaſon why it ſhould be; for ſince that men that are of the Corporation take up-

on

on their coming to be free an Oath to preserve the Rights, Liberties, and Privileges of it; and since the Active Members are intrusted for all the other Members that elect and chose them, and also for their Successors; I cannot see how a man can satisfie himself in so doing.

Rep. 11. 98. Sr. James Baggs Case; They forfeit their Freedom by doing contrary to their Oath and Trust.

If every Freeman by his Oath and Trust be obliged to seek the Benefit of the Corporation, to surrender is against the Oath. The Law seems to have a care of preserving Corporations, and therefore provides that the taking any new Charter, though there be many Alterations in Offices and Names, yet doth not surrender the old. But were it of any other Franchise, the taking a new of the same thing is a Surrender of the old.

Dean and Chapter of Norwich Case, Rep. 3. 73.

Jones, 266. Fulcher and Heyward's Case seems a strong Case to prove it not surrenderable. And though the Bishop did not in that Case joyn in the Surrender, that cannot hinder; because the Bishop is no part of the Corporation, and therefore cannot hinder them to surrender if they will.

4 H. 26. 22. b A Mill Incorporate, by the name of Bayliffs: The King de nova Incorporates them by the name of Sheriffs; Are their Privileges that they before had gone? no Dieu defend, saith the Book. But this being not my question, I intend not to debate it throughly, but to keep to the point of a Forfeiture of a Body Politick or Corporation, and farther to examine the reasonableness and justice of this Doctrine of Forfeiture, and see how adequate and just it is; for that is the thing, I perceive desired.

1. First, Their Position is, That a Corporation or being of a Body Politick, is a Liberty or Franchise, and if abused or misused, is forfeited, determined and dissolved.

That I may a little understand this Position, and consider of Abuse and Misuse, and of the extents and consequences of it. By Abuse or Misuse, every Act that a Corporation doth, that is not Justifiable by Law, is, as I take it, an Abuser or Misuser. If a Corporation receive any Money that is not due to them, if it be by virtue of any By-Law, that is a Forfeiture, though it be but a Groat. What if they by their Common Seal command their Servant to enter into such Lands, or Distrein such a man's Cattle for Rent not due; Is not this a taking upon them to oppress the King's Subjects, and to extort from them their Lands or Moneys where not due? this is a Misuser. A Body Politick, as I have said, is but a Person created in resemblance of a natural Person, to have a Capacity to take, hold, and enjoy to particular ends and purposes. And hold or enjoy is not possible, without acting; and all that Act must of necessity be subject to

Errors

Errors ſometimes, in their actions as natural Perſons are. And muſt it be ſo penal to them that every Error, Miſuſer or Abuſer, muſt be a Forfeiture? Can it be reaſonable or juſt in Law that this can be? Laws are made for Preſervation, not for Deſtruction; if every Abuſer or Miſuſer forfeit, be it a ſmall Tranſgreſſion, is it either reaſonable or probable that any Law ſhall puniſh it with deſtruction of the Body? The greateſt Offence, be it Treaſon or Rebellion, or the leaſt illegal Act, Offence, or Miſdemeanour, muſt have the ſame meaſure of Puniſhment by this Rule, and the Law then doth not diſtinguiſh. If a natural Body, or Perſon, hath a Market and orders his Servants to take ſuch Tolls, and he takes them; What would this Crime be, beſides Forfeiture of his Market? Why ſhould a Corporation then not only in ſuch Caſe, or for any Offence or Miſcarriage to the value of a Peny, forfeit and loſe, as in the Caſe of High Treaſon, his Life or Being, Lands, Goods and all? This cannot be agreeable to any Rules or Reaſon of our Law; and therefore I take it, it cannot be the Law. The next thing is the Miſchiefs and Inconveniences.

2. The Miſchiefs and Inconveniences that muſt attend this Doctrine or Law of Forfeiting and Surrendring, if the Law be ſo.

1. Firſt, Let us conſider, whether this at one ſtroke do not make all the Corporations in England, of all ſorts, forfeit at once, and perhaps many years ſince. Is there any Corporation in England that hath not Offended or Tranſgreſſed? all manner of Corporations fall under this Rule. If they have tranſgreſſed or done any ſuch Act as makes a Forfeiture, (as every miſcarriage, for any thing I can ſee to the contrary, doth,) whether the Corporation be ipſo facto diſſolved by the Offence committed, or elſe by the Judgment, which muſt relate to the Offence, to avoid all mean Acts done by the Corporation. All that they have done ſince ſuch Miſcarriage they have done without right; and all that they think they have a Title to as a Corporation, they are miſtaken in, they have none. Perhaps if a Parliament ſhould be called, thoſe forfeited Corporations can lawfully ſend no Burgeſſes. I do not know whether I am miſtaken or not, I only offer this to Conſideration amongſt others: As, give me leave to venture a little farther upon theſe Conſiderations of Surrenders and Forfeitures of Corporations. Can a Biſhop, Dean and Chapter, Prebendary, Parſon, &c. ſurrender his Corporation or Body Politick? If they can, moſt of them, perhaps, are of the foundation of the Crown, and had their Lands from thence. We have many Statutes made to reſtrain their Alienations: Thoſe of Queen Elizabeth did not extend to hinder their Alienations to the Crown; but perhaps, out of hope of Preferment, they alienes to the Crown till the Statute of 1 Jacobi cap. 3.

took

took away that Power also of conveying to the Crown: Can these forfeit the Corporations? Perhaps we are Sinners all, or at least as the ballance at some time or other may be holden, may be found too light; we are upon a point that goes to severity, fear, and favour; what may it doe, and what may it not doe? If they may surrender a forfeit, what effects may this have upon the whole Ecclesiastical Estate? If this had been known in the days of King Henry the Eighth, perhaps there would have been no great need of Acts of Parliament to make him Head of the Church, or to have dissolved the Monasteries. Suppose that Colleges, Hospitals, and other Corporations founded for Charity, can surrender or forfeit; the present Masters and Fellows, and the Heirs of the Donors may truck; what effect may this have upon them? what ways may they find out? Also Cities and Boroughs; what Divisions and Contentions hath it already produced, some for surrendring, others for defending what Animosities are about it: The end of the Law is to preserve Peace and Quiet. Divisions and Dissentions frequently end in the Destruction of both Parties. The Citizens and Burgesses are, I think, three parts of four of the House of Commons. It is considerable what Effects this may have in Parliaments, our Laws and Posterities perhaps not a little concerned herein; and if so, surely this is a great Case. But if only the City of London, give me leave to see what the ill Consequences and Mischiefs will be. Arguments from Mischiefs and Inconveniences are forcible Arguments in Law.

Inst. 1. 11. 60. The saith Littleton, and my Lord Cook upon Littleton; and men must be desperate and sensual that despise future Mischiefs and Inconveniences, and many other places there cited. First, all their Lands will be gone and revert to the Donors, and their heirs.

Jones, 190. By Dissolutions of Corporations, all their Privileges are gone, and their Lands revert to their
F. N. B. 33. k. Donors, or Lords of whom they were holden.
Inst. 1. 13. b. Secondly, all their Markets, Tolls, and Duties that they claim by Prescription, whereby the Government, and the honour of the City, the Publick Halls, Gates, Prisons, Bridges, and other Edifices, are in a great measure maintained. Thirdly, All the Debts owing to the City, and all their personal Estate by the death or dissolution of the Corporation will be gone, but who shall have them? perhaps, non dissinitur in jure. Fourthly, all the Liberties and customary Privileges that the Freemen of the City, their Wives, and Children claim, (viz.) to have customary shares in their Husbands or Fathers Estates. To be exempt from Tolls in other Towns, Ports and Markets; to exclude Foreigners and Unfreemen from using their Trades in London, and many others. Fifthly, All the Acts of Parliament that give particular Powers and Authorities to the Lord Mayor, and Aldermen, or Common Council, or Corporation respecting either

either the Government or Juſtice of the City; as about Miniſters, and payment of their Dues, Buildings, Paving of Streets, Sewers, Enſurance Office, and many others. Sirthly, What ſhall become of the Orphans, and all the Moneys and Debts the City owes, and all the Charities in the City? We have ſeen the City burnt, and may remember what a Swarm were unhived thereby; but we never yet ſaw it diſſolved, nor are the conſequences meaſurable. And though it pleaſe his Majeſty upon the Diſſolution of this to grant a new Charter, yet it will be impoſſible any of theſe things can be preſerved: Their Lands, Eſtates, Debts, Privileges, Cuſtoms, are all perſonal, and annexed to the Corporation, and muſt live and dye with it; the ſaid Acts of Parliament are all fixed to this Corporation, and ſo are the Charities, and cannot, as I conceive, be ever transferred to any other to be new created. A new Corporation can be in no ſucceſſion or privity with the old.

If a Body Politick be once diſſolved, though a new one be founded of the ſame Name, that can have no ſucceſſion to the old, nor come in privity to it: Therefore is it that in the Dean and Chapter of Norwich Caſe, and in Fulcher and Heyward's Caſe, the Preſervation of the old Corporation is inſiſted on. If every Abuſer committed by a Corporation, be a Forfeiture, Determination, or Diſſolution, Is there any one in England not forfeited and diſſolved? Abuſe is a word of wonderfull large ſenſe; when the Law ſpeaks of a Franchiſe abuſed or miſuſed, it is applicable to a particular Franchiſe, as to a Market, Court, or the like, and if that Franchiſe be miſuſed or abuſed, in Oppreſſion or miſuſe, contrary to the ends of it, ſome certainty there is in it: But the Abuſe of a Corporation extends to all its Acts, and all Eſtates of the Corporation, and all the Privileges of all the particular Perſons, and all that are concerned in them, are ſufferers for every Abuſe, or Miſuſe, or Mil-act, or Treſpaſs, how ſmall ſoever. Who can tell in the Actions of a Perſon what may be taken to be ill or illegally done, or an Abuſe? Who will truſt a Corporation, if its Duration and Exiſtence be ſo fickle and infirm, that every Abuſer or Miſurer ſhall forfeit it? There will be no need of Officers to be amoved, thereby to determine this Corporation at will and Pleaſure, this Poſition contains enough to doe all. Theſe great conſequences attending this Doctrine of Forfeiture, are Reaſons to prove the Law otherwiſe.

Inſt. 1. 102. b.

Obj. But, ſaith Mr. Attorney, (if I underſtand him,) we do not intend to deſtroy the Corporation, though we ſay in our Pleading that you have forfeited your old Corporation, that you have without any lawfull Authority uſurped upon the King, and pray in our Replication, that de Libertate Privilegio & Franchefia illa, (viz. the being a Corporation,) abindicantur & excludentur. Theſe are but words of

form, we only will lay the King's hands gently upon it, and ſeiſe it, but the Corporation ſhall not be deſtroyed or diſſolved.

Reſp. This is wonderfull, and a great Compliment to the City, as I take it; let us not flatter or deceive one another. We are not now in the irregular days in the Records mentioned, nor in ſuch ſort of Proceedings as in thoſe diſtracted times. Let us not go by blind conjectures, out of old Records, and bring in unknown ways. We are now in a Quo Warranto, which, as Mr. Attorney truly ſaith, is in the nature of a Writ of Right; and a Writ of right is the higheſt Writ that is in the Law, and the Judgment therein, and in this Quo Warranto muſt be concluſive to all Parties. If given againſt the Defendants, it muſt conclude them for ever, and diſſolve their Corporation, and if given againſt the King, he ſhall never hereafter bring it in queſtion for any cauſe precedent. Cook's Entries 527. D. hath a Precedent of it, Conſideratum eſt, quod the Defendant de & in Libertatibus, Privilegiis & Franchiſiis pred. in Informatione predict' ſpecificat' nullo modo ſe intromittat, ſed ab iiſdem penitus excludatur. The like againſt Ferrers, and the Virginia Company, and many others may be found. The Court cannot alter the Judgment, it will be erroneous if they doe. And to talk of a Judgment of a Seiſure, what is the meaning of it, or ſuch Judgment? Is it final or not final? The Court muſt give a final Judgment, that the Party, if he think fit, may have his Writ of Errour. The Court will not take any of your old Records to go by, if any ſuch to be found, that would warrant any other Judgment: Therefore a Seiſure, without ſuch a Judgment that determines the Corporation, cannot be any way brought to paſs, as I believe, nor can I underſtand in whom, by your Seiſure, you would have the old Corporation to ſubſiſt. Transferred from the Perſons in whom it now ſubſiſts I think is impoſſible, but diſſolved by your Judgment it may be: And I hope your Lordſhip will not be induced by ſingular unwarrantable Things. That a Judgment ſhould be given that ſhall neither diſſolve the Corporation, nor continue it, that ſhall neither be for Plaintiff nor Defendant, that ſhall leave the Corporation neither alive nor dead, but in Tranſitu, or Limbo Patrum: A Judgment

Rep. 9. 28. Inſt. 2. 282, 495.

M. 21 Jac. r. 9.

Quod capiantur, or quod Libertates & Franchiſii pred.' ſeiſiantur in manus Domini Regis.

Was there ever any the like? What ſhall be underſtood by it? Shall we be afterwards a Corporation? Shall our Magiſtrate continue? Shall we have our Lands, Markets, Tolls, Cuſtoms, or Franchiſes, or not? Or ſhall we be none, and yet not diſſolved? I muſt confeſs I am confounded in theſe Notions.

Next,

Next, As to the Authorities in Law for me:

1. I take it to be a great Authority for me, that there is no Precedent, or Judgment, or Book Case, produced or found, that ever a Corporation was forfeited. It lyes upon the other ſide to produce it, or ſhew it, and no doubt they would, if there had been any, but there is none by the Authorities they cite; you may eaſily perceive, any ſort would not be omitted.

2. The Nature of a Corporation, as our Books do deſcribe it, ſhews it not forfeitable. I take it plain out of the Case of Sutton's Hoſpital, and the other Books there cited. Rep. 10. 92. b. 21 E. 4. 72. A Corporation aggregate is Inviſible, Immortal, and reſts only in Intendment and Conſideration of Law, cannot commit Treaſon or Felony, be Out-lawed, Excommunicate, hath no Soul, cannot appear in Perſon, cannot doe Fealty, cannot be Impriſoned, not ſubject to Imbecility or Death. They cannot commit any actual Treſpaſs or Diſſeiſin, except under their common Seal, Br. Corp. 24. 34. by command precedent, or aſſent ſubſequent; when our Books ſay, that they are a Body Politick, and reſt or have their being in Intendment or Conſideration of Law; thereby is meant, that that they are by Law enabled to Act to particular ends and intents, anſwerable to their ends and creations. Their ends or creations are only to be ſubſervient to the publick Good, and Government and Preſervation of the City or Town Incorporate, of the Members thereof. And if there be any Act done by the Members that are the active part of ſuch Corporation, to any other intent, end, or purpoſe: This, not the Act of the Corporation, but of the particular Members, and they only anſwerable for it. And as to particular Offences and Miſcarriages in this Caſe alleadged, it cannot be denied, but that the particular Members are anſwerable for it; and if they, then according to all Books, they ought not to be doubly chargeable or anſwerable in both Capacities. And the Caſe cited out of Bagg's Caſe, of a Freeman convict of Perjury, and thereupon Diſfranchiſed, doth not prove that they ſhall be puniſhed in a double Capacity, for the Corporation is not thereby puniſhed, but preſerved. The being of a Body Politick, is only a Capacity, and in reſemblance of a natural Body, and no more forfeitable than a natural Body. It is ſeiſing & forfeiting of Liberties that we meet with, that is ſuch as are generally ſpoken of; as Markets, Courts, Juriſdictions, and the like: And in the old Records, by ſeiſing the Liberties of a Corporation, is meant, the taking from them their Officers, and putting in others upon them for a time. But a forfeiting, diſſolving, and determining the Body Politick, never was yet done or known, nor, as reaſonable to believe, ever entred into any mans thoughts till now; for I have already ſhewn, that Offences and Miſcarriages that were committed by the Corporations in thoſe troubleſome Times of E. 1. E. 2. and R. 2. for which their Liberties were ſeiſed, were not Forfeitures and Determinations of

those Corporations, they all remain Corporations by Prescription to this day: And I have also taken notice, that the Acts of Parliament that were made in the succeeding Kings Reigns, of H. 4. H. 5. and H. 6. are only Acts of Confirmation to the Cities and Boroughs, of the Liberties and Privileges. From that time till within these three years, I believe it never entred into any mans thoughts that a Corporation was forfeitable; for farther proof whereof, divers other Statutes, and the whole series of matter is Argument.

15 H. 6. cap. 6. The Statute of H. 6. that provides against Abuses and Exactions made by Societies Incorporate by their By-Laws and Ordinances, and appoints a Forfeiture of ten Pounds, and of their power to make By-Laws. To what end should this be, if the Corporations themselves were forfeited, or thought so to be.

19 H. 7. cap. 7. The Statute of H. 7. recites the Statute of H. 6. and the Exactions and Abuses by Fellowships, by their By-Laws and Ordinances, and Ordinances, and appoints a Penalty of forty Pounds upon a they exact Money by an unlawfull and unwarranted By-Law, not examined and signed by the Chancellor and Chief Justice.

12 H. 7. cap. 6. The Statute of the 12 H. 7. cap. 6. sets forth grievous Exactions by the Fellowship of Merchant Adventurers, by their By-Laws, and imposeth a Penalty for the future.

The Statutes 22 H. 8. 4. 28 H. 8. 5. shew like Exactions by Corporations upon Apprentices by their Ordinances and By-Laws, provides Remedy, and enacts Penalty. If in those times it had been thought or imagined that a Corporation had been forfeitable, every of these Offences forfeited it, what need farther Remedy. In the Case of Hoddy and Wheehouse,

Moor. 474. 39 Eliz. of excessive Toll by the Town of Northampton.

Palmer. 77. In the Quo Warranto against a Corporation, though the Question was concerning their taking Toll, and whether they had forfeit their Market, or only their Toll, no thought of forfeiting their Corporation ever mentioned.

So that I think I may conclude with the tumultuous times of E. 1. E. 2. and R. 2. what was then done, doth plainly shew the Corporations were not forfeit or dissolved. That by all the Acts of Parliament, and Proceedings in almost all the Reigns of any length or duration, from that time to this very Case, the Opinions and Thoughts of men were otherwise; as by the Statutes and Translations appears, Not one Opinion, Book, or Authority produced, or to be found.

The great Concern not only of this great City, but of all other Cities, Towns, and Corporations Ecclesiastical and Temporal, all depend upon it. And which is more than all, the very Government by Law Established, will be in great danger of Alteration by it.

I have argued long, and tryed your Lordſhips patience; the weight and length of the Caſe, and rareneſs of the matter, there never having been the like before in any Age, will, I hope, excuſe me. But beſides the whole frame and foundation that the other ſide have laid, being all built upon general undigeſted Notions, as I take it, viz. That Abuſer and Miſuſer of Liberties forfeits them, without diſtinguiſhing betwixt one thing and another. That the words Forfeiting and Seiſing Liberties, found in old Records, ſhould be Authorities to prove forfeiting Corporations or Beings of the Body Politick, though no ſuch thing then, or at any time ſince, till very lately, ever thought on or imagined. It was neceſſary for me to open and ſet forth theſe general notions, and to explain and diſtinguiſh; which, I hope I have done, that it may appear what the ſenſe of them is, how far they agree with Law and Juſtice, and how far not. And if in the doing hereof, or the ſetting out the repugnant or inconſiſtent Matters or Opinions ariſing in this Caſe to maintain this Quo Warranto, I have expreſſed my ſelf in any other manner than became me, I humbly beg pardon for it; and that it may not reflect upon the Cauſe, nor prejudice it.

Upon the whole Matter,

If this Information brought againſt the Body Politick for Uſurping to be a Body Politick, ought to have been brought againſt the particular Perſons.

If it be repugnant or contradictory, that a Corporation can uſurp to be a Corporation; that a Body Politick or Being can uſurp to be a Body Politick or Being, before it had a Being, or to be that ſame Body Politick or Being, which it was when it did uſurp.

If forfeiting a Franchiſe, or Liberty, or other Eſtate, cannot determine or veſt that Franchiſe or Eſtate in the King till the Forfeiture appear on Record. Then the old Corporation ſuppoſed to be forfeited, if it were ſo, did notwithſtanding, and yet doth continue in being, there being no Record to determine it; and conſequently that which is pretended a new one by Uſurpation is impoſſible.

If by Seiſure into the King's hands (as pretended) the Continuance of the Corporation be intended; How inconſiſtent is it with Law or Juſtice to continue any thing in the King that is wrongfully uſurp'd, and the Parties to be puniſhed, fined, and committed for uſurping.

If Mr. Attorney's Replication taking iſſue upon our Preſcription to be a Corporation, and going over and alleadging ſeveral diſtinct Cauſes of Forfeitures, cannot by Law be maintained; and in the Example doth introduce a way to bring all mens Eſtates ſubject to Mr. Attorneys will and pleaſure. For, let any mans Right be as good as can be, it will be ſcarce poſſible to defend it, if ſuch Pleadings as in his Replication be allowable by Law.

Then be the matter in Law as much againſt us as poſſible; yet Mr. Attorney can have no Judgment for him upon this Information.

Next,

Next, Supposing the Information all good in Law. Yet,

If the Judgments, Records, and Authority that have been cited by them for Seisures, do plainly shew that Seisures and Forfeitures are very different in their Natures. That the Corporations all continued notwithstanding the Seisures: And the Seisure was only the Kings putting in Mayors and Officers to act in them instead of the others Elected or Constituted by the Corporation, and they remain Corporations by Prescription to this day, and never were forfeited, dissolved, or determined by such Seisures.

If the General Authorities in Books that the Wilfuling or Abusing a Franchise be truly applicable to Franchises (that are Estates and Interests grantable or conveyable from man to man) and never were intended of such a thing as is rather a Capacity or Being, than a Franchise.

If there be no Case, or Precedent, or Opinion to be found for it. If of the contrary, the particular Cases cited prove, that where the Corporations have by Miscarriages forfeited particular Franchises, they do not forfeit their Corporations. If there be scarce any Corporation in England, that have not at some time or other done something they should not, or omitted to do something they should, and thereby forfeited their Corporation, and consequently all are Usurpers, and their Corporate Acts since done all void.

If the Corporation here hath done nothing, but that the Mayor, Aldermen, and Common Council, are only Delegates, Deputies, or Ministers of the Corporation for particular purposes.

If Servants, Deputies, or Delegates, doe that which they have no Authority to doe, they must answer for it in their own Persons; but their Masters, or those that deputed or delegated them for another purpose, they are innocent; they shall not suffer by it, though no Acts of Parliament had been in the Case.

If the Acts of Parliament against Seising the Liberties of the City, for, or by reason of any miscarriage of their Officers or Ministers, extend to these Acts of the Mayor, Aldermen, and Common Council.

If so be that these Acts were the Acts of the Corporation; Yet with Submission, if they have shewn a good and legal Right by their Custom and Title, to make By-Laws for regulating and settling the Markets and Tolls, and that which they have done be as pleaded reasonable, and that there was reasonable Ground at that time for their Petition which they have set forth.

If all these particulars that I have now summ'd up be against me, then Judgment must be against me; though I know not what that Judgment can be.

But if any one of these particulars, thus repeated, be for me, and against Mr. Attorney; then Mr. Attorney can have no Judgment against the City; But Judgment must be for them. Which I humbly pray.

The

The next Term, viz. Trin. 35 C. 2. Ch. Juſt. Saunders dying the day of the Judgment given, or the next day after, Mr. Juſt. Jones, Juſt. Raymond, and Juſt. Withens, being in Court, Juſt. Jones pronounced the Judgment of the Court, and Juſt. Raymond, and Juſt. Withens affirmed, that Ch. Juſt. Saunders was of the ſame Opinion with them, and that they all agreed,

1. That a Corporation aggregate might be ſeiſed.

That the Stat. 28 E. 3. c. 10. is expreſs, that the Franchiſes and Liberties of the City, upon ſuch Defaults, ſhall be taken into the King's hands.

And that Bodies Politick may offend and be pardoned, appears by the general Article of Pardon, 12 C. 2. whereby Corporations are pardoned all Crimes and Offences.

And the Act for regulating Corporations, 13 C. 2. which provides that no Corporation ſhall be avoided for any thing by them miſ-done or omitted to be done, ſhews alſo that their Charters may be avoided for things by them miſ-done, or omitted to be done.

2. That exacting and taking Money by the pretended By-Law, was Extortion, and a Forfeiture of the Franchiſe of being a Corporation.

3. That the Petition was ſcandalous and libellous, and the making and publiſhing it a Forfeiture.

4. That the Act of the Common Council was the Act of the Corporation.

5. That the Matter ſet forth in the Record did not excuſe or avoid thoſe Forfeitures ſet forth in the Replication.

6. That the Information was well founded. And

Gave Judgment that the Franchiſe ſhould be ſeiſed into the King's hands, but the Entry thereof reſpited till the King's Pleaſure was known in it. Juſt. Raymond and Juſt. Withens declare, that they were of the ſame Opinions in omnibus.

And accordingly after Entry made by Mr. Attorney,

That as to the Iſſue joined to be tried by the Countrey.

As to the claiming to have and conſtitute Sheriffs.

As to the having the Mayor and Aldermen to be Juſtices of the Peace, and to hold Seſſions, quod ipſe pro Domino Rege ulterius non vult proſequi.

Judgment is entred. Ideo conſideratum eſt quod prefat' Major & Communitas ac Cives Civitat' Lond' as to the Iſſue aforeſaid, betwixt our Lord the King and them joined, and as to the Liberties and Franchiſes aforeſaid by them claimed, to have and elect Sheriffs, and to have their Mayor and Aldermen to be Juſtices of the Peace, and hold Seſſions,

Eant inde ſine die ſalvo jure Dom. Regis, ſi al', &c.

Et quoad dictas ſeparales materias in lege unde tam pred' Att' Gen' quam pred' Major & Communitas & Cives Civitat' pred' poſuerunt ſe in Judicium Curiæ, the Court adviſe till Trinity Term, and then pro eo quod videtur Curiæ hic quod prefat' Major & Com-

Communitas ac Cives Civitat' pred' forisfecerunt Domino Regi nunc Libertat' Privileg' & Franchef. pred' ob cauſas in Replicacon' prefat' Attorn' Gen' ſuperius ſpecificat' quod Placita prefat' Major' & Communitat' ac Civium Civitat' pred' ſuperius rejungendo & repellando in ea parte placitat' materiaq; in iiſd' content' minus ſufficien' & invalid' in lege exiſtunt ad precludend' dict' Dom' Reg' a Forisfactura pred' aut ad Major' & Communitat' ac Cives Civitat' pred' ad clamand' Libertat' Privileg' & Franchef. pred' ſibi allocand' & adjudicand' manutenend' maturaq; deliberacione ſuperinde prius habit'.

Conſiderat' eſt, qd' Libertat' Privileg' & Franchef. pred' ſore de ſeipſis unum Corpus corporat' & Politic' in re facto & nomine per nomen Majoris Communitatis & Civium Civitat' Lond' ac per idem nomen placitare & implacitari, reſpondere & reſponderi per eoſd' Majorem & Communitatem, ac Cives Civitat' London pred' ſuperius clamat' capiantur & ſeiſiantur in manus Domini Regis & quod prefat' Major & Communitas ac Cives Civitat' Lond' pred' capiantur ad ſatisfaciend' dict' Dom' Reg' de Fine ſuo pro Uſurpatione Libertat' Privileg' & Franchef. predict'.

Poſtſcript.

Postscript.

THE Question concerning the Surrender of Corporations or Bodies Politick, not being directly in the Case, but in the Arguments on both sides insisted on, it may not be unnecessary to state that Point, and collect what hath been in the Debates or Arguments alleadged on either side, that the easier View and Judgment may be made of it.

By Surrender in this Question is by both sides meant and intended, some Deed or Instrument in writing, whereby a Body Corporate or Politick can surrender and dissolve it self.

It is agreed that a Body Politick may be dissolved, either by the Death of the Persons incorporate, or their Refuser to act, nominate, or elect Officers or Ministers, so as there remain not sufficient, authorized or enabled by their Charter or Constitution, to preserve their Being: This is admitted to be a Cesser, or Dissolution of the Corporation, and such a sort of yielding up, or Surrender, is admitted possible.

But whether by any Deed or Instrument in Writing it can be done, that is the Question intended.

For the Surrender, It hath been alleadged,

1. That the Being of a Body Politick is a Liberty, Privilege, and Franchise, that had its Commencement by the King's Charter, or by Prescription, which supposes a Charter; and if it have its beginning and Creation by Charter, which is the Kings Deed that grants it, by Deed again it may be regranted and surrendered.

And 'tis a Maxim in Law,

Unumquodque dissolvi potest eod' modo quo ligatur.

And instances in Fairs, Markets, Leets, and such like Franchises, granted by Charter, which, say they, may be surrendered by Deed, or Regrant.

2. That it is necessary that it should be dissolvable by Surrender, perhaps a Town may come to decay, and not be able to defray the charge that the Support and Maintainance of the Corporation may require; for every one sees that Ornaments and Officers must be, and these cannot be bought, or maintained, without Estates, and poor men are not able, without ruine to their Families, to bear the Magistracies and Offices,

fices; And therefore necessary there should be a Power in them to surrender.

3. That the Books and Cases in Law do prove, That a Corporation, or Body Politick, may surrender itself, and thereby be dissolved.

Dy. 273. There the Case is thus stated:

The Deanry of the Cathedral Church of Wells was dissolved by the Surrender of Fitz-Williams, tempore H. 8. And the Prebend of Currey, in the same Church, was also surrendered by Goodman, Prebendary there, 1 E. 6. And in this Year the Dissolution of the Deanry was confirmed, and the Deanry extinct by Act of Parliament, and a new Dean erected and created, to which new Deanry the Lands and Possessions of the old were annext, amongst other Possessions, and the Nomination of the new Dean and Successors, given by that Act to the King, and that he should have the same Power in Choro & Capitulo, as the old Dean had, saving to all Strangers, other than the Bishop of Bath and Wells, the old Dean, and the old Prebendary, and their Successors.

In this case 'tis admitted, and taken for granted, that the Deanry, and also the Prebend were surrendered.

Dy. 282. There the Archbishop of Dublin had two Chapters, viz. the Dean and Chapter of St. Patrick, and the Dean and Chapter of Christ-Church, and both these used to confirm the Bishops Leases. The Dean and Chapter of St. Patrick, by Deed under their common Seal, gave and surrendered all their Church, Houses, Lands, and Possessions, to the King, without license or consent of their Bishop, being their Ordinary, and Patron of the most part of the Prebends.

After this Surrender their Church was used as the Common Hall, for the four Courts in the Term there; and a Lease is made by the Archbishop, confirmed by the Dean and Chapter of Christ-Church only, and whether the Successor of the Archbishop were bound by this Lease, was the Question.

The Judges in Ireland were divided in Opinion, and thereupon the Case sent over for the Opinion of the Judges here, and the Opinions and Resolutions of five Justices, viz. Catlyn, Dyer, Saunders, Welsh, and Carus, certified to the Lord Deputy of Ireland, under their Hands, were, quod non fuit aliud Capitulum in esse tempore confirmationis Dimission' pred' nisi Christ-Church tantum, quia Corporatio & Capitulum Sancti Patrick fuit per donum & sursum reddition' Decani & Capituli pred' legitime dissolutum absque consensu Archiepiscopi.

Jones 168. The Opinion of Justice Jones there, That a Corporation may be dissolved by an Act proper, viz. by Resignation.

On the other side, it hath been answered,

1. Ad-

1. Admitting it to be true, that to be a Body Politick, is a Liberty, Privilege, and Franchiſe, created by Charter, which is the King's Deed.

Yet it doth not follow that it may be ſurrendered by Deed.

For the Charters that incorporate the Citizens, or Inhabitants, of ſuch a City, Town, or Place, and make them a Body capable of taking and having Lands, Goods, or Chattels, to ſue and to be ſued, and to have a Common Seal, and to act according to the Powers, Ends, and Purpoſes in their Charters contained, only give them a capacity for thoſe Ends.

The Liberty, Privilege, and Franchiſe that they have goes no farther.

They cannot transfer this Privilege, or Franchiſe, to any other Perſons.

Theſe are only perſonal Franchiſes or Capacities, fixed in the Perſons in whom they are granted.

Like to Patents of Denization granted to Aliens, whereby a capacity is granted to have, hold, and act, as a natural born Subject.

Grants of Enfranchiſing a Villain.

Theſe are Grants that cannot be ſurrendered.

Theſe are Franchiſes and Capacities like this.

Theſe are Exceptions to the General Rule,

Unumquodque diſſolvitur eodem modo, &c.

So alſo of Fairs, Markets, Courts, &c. They are created by Charter, they may be granted over, or granted to the King; but if they be regranted to the King, they are not extinct, but remain in the King.

Abbot of Strata Marcell's Caſe, Rep. 9. 25. b ſhews the difference thus:

When the King grants Franchiſes that were in the Crown before the Grant, as Bona Felonium, Deodands, Wreck, &c. and theſe come again to the Crown, they are merged in the Crown, and the King is ſeiſed of them jure Coronæ.

But when a Privilege, Liberty, Franchiſe or Juriſdiction, was at firſt erected or ordained by the King, there, by the coming of it again to the Crown, they are not extinct, and inſtanceth in Fairs, Markets, Hundreds, Leets, & ſimilia.

They are not diſſolv'd or gone, for thereby Subjects would be prejudiced: For if the Court ſhould be ſo granted, and thereby diſſolved, the Subjects Judgments and Suits in thoſe Courts would all be loſt.

Theſe are other Exceptions to that general Rule,

Unumquodq; &c.

2. That the Reaſon given for the Surrenders of Corporations from the poverty that may happen for the conveniency of ſome Corporation is anſwerable; for that doth not very frequently happen: But when it doth happen, if they are weary of it, they

may let it alone, and not act or chuse Officers, it will cease of it self, need not be at the charge or trouble of a Surrender.

But on the other side, the Inconveniences are very great, and are some of them before specified.

The Establishment of the Church is all in Corporations, Bishops, Deans, Chapters, Prebends, Parsons, Vicars; if these be surrenderable, as by the Cases cited, without consent of Bishops; (a Prebend is, as to his being, but as a Parson, or a Vicar.) The Universities, Colleges, Hospitals, all the Cities, considerable Towns, Trades, and Mysteries, are Corporations; if these be surrenderable, it affects our old Government.

3. As for the Books and Authorities. Dy. 273. the Dissolution of the Corporation thereby surrendred, is only mention'd in putting the Case, it is not debated, nor was it material in the Case: For the Act of Parliament there settled the new Dean and Chapter, and the Prebendary, and the matter of the Case ariseth upon the Deprivation of Dean Goodman, and the appeal and reversal of that Sentence, there is not as much as any Opinion in the Case concerning the Dissolution or Surrender, whether good or bad.

But what may reasonably be inferr'd from that Case is, That the Surrender and Dissolution thereby was not good in Law; for if it had, what needed the having an Act of Parliament to secure against the old Dean and Prebendary; which appears in the Case was had. And,

Co. Rep. 3. 75. b. in the Case of the Dean and Chapter of Norwich, This Case of Dyer is cited, and there expressly said, that that Surrender was not thought good, till confirm'd by Act of Parliament.

And as for the other Case, Dyer 282. of the Surrender of the Dean and Chapter of St. Patrick.

The Opinion of the Judges there given, is by all the Judges, 3 Car. 1. in the Case of Heyward and Fulcher, in Jones, 168. denied to be Law, and said to be a private resolution.

So that these two Cases in Dyer, having been by those later Authorities denied, remain no Authorities. And as for the other Authority, viz. The opinion of Justice Jones 168. that a Corporation may be dissolv'd by a proper Act, viz. by Resignation.

That is true; taken in the sense he speaks it, it is spoken of a Dean and Chapter resigning to the Ordinary, viz. The Dean resigning his place of Dean, and the Prebendaries of the Chapter, resigning their Prebends to the Ordinary; whereby their Churches and Prebends became void, and to be supplied by the respective Patron, collating or presenting, as in Cases of Resignation, by any Parson or Vicar to his Ordinary.

But this is nothing of a Surrender of the Body Politick to the King, and thereby dissolving the Corporation, and destroying all supply, by new Presentments or Collations.

And

And this appears by the very words of Juſtice Jones there; for when he ſaith they may be diſſolv'd by a proper Act, viz. by Reſignation; the next words are, or by death of the whole Corporation, and the King being Patron, 'tis in his Election whether he will collate de novo, or not, and till he collates the Corporation is in ſuſpenſe; but if the Biſhop be Patron, then the Biſhop upon the Reſignation, hath power to collate, and thereby to continue the Corporation: So that it is very plain, that the Reſignation he ſpeaks of, is not meant for any Surrender to the King, or any thing that determines the Corporation, except the Patron will not collate, and thereby ſuffer the Corporation to ceaſe.

But of the contrary, that a Corporation cannot be diſſolv'd by any Surrender.

The Suppreſſion and Diſſolution of the Abbies, Priories, and Monaſteries, by H. 8. was no Diſſolution of their Bodies Politick.

Br. Extinguiſhment, 75.

Br. Corporation, 78.

Davies, Rep. 1.

Moore's Rep. 282. Though their Houſes and all their Poſſeſſions were gone, and the Perſons either diſcharged of their Orders, or ſent into other Houſes; yet reſolved, that the Corporations remain'd. And it can ſcarce be imagin'd, but in ſome of thoſe Caſes it would have been practiſed, or at leaſt ſomething ſaid about ſurrendring their Body Politick, if it had been then thought ſurrenderable.

But the Caſes of the Dean and Chapter of Norwich, Rep. 3. 41 Eliz. before cited.

And the Caſe of Heyward and Fulcher before mention'd in 3 Car. 1.

Jones, 168.

Palm. Rep. 500, 501.

Anderſ. 2. 120.

Have been cited as Judgments againſt Surrenders by all the Judges of the King's Bench.

The Caſe was, That the Dean and Chapter of Norwich, 3 Junii 1 E. 6. ſurrendred to the King their Cathedral Church, & all their Mannors, Lands, Tenements, Hereditaments, Franchiſes and Liberties, Spiritual and Temporal, by whatſoever names they are known, or which they have or ought to have in the Right of their Church.

And by the Caſe 41 Eliz. Co. Rep. 3.74.

And the Opinion of all the Judges of the King's Bench.

3 Car. 1. adjudged that this was no Surrender of the Corporation.

Obj. That the words of the Surrender do not ſhew any intent to ſurrender the Corporation, but only the Poſſeſſions.

Reſp. The being of a Corporation, is a Franchiſe or Liberty.

And

And there is an express Surrender of all Franchises and Liberties Spiritual and Temporal, by what name soever known, which they have in the right of their Church.

And this was a Spiritual Franchise, which they had in right of their Church.

Next, This Surrender was made with intent to dissolve the Corporation, and to have a new one erected; this appears by the new Charter of Erection, made in November following; which recites the Surrender made to that intent.

It is not any where in the many Arguments of that Case, alleadged that there wanted words in the Surrender to doe it, which would have been, if that had been the Ground of their Judgment.

In the Case cited out of Dyer 282. there the words of the Surrender were, that they surrendered their Church, Houses, Lands, and Possessions, which are not half so large and ample words as in this Surrender are contain'd; and the other side cite that as an Authority to prove a Corporation surrender'd, and admit the words there sufficient, and deny them to be sufficient here, though much more large, express, and general.

The arguing there in Palmer 501. that it is against the Nature and Constitution of Corporations, that by the words put in their Charters, by their very Constitution are to have perpetual Succession, perpetuis temporibus duratur, and which by their Oaths they are sworn to preserve, that they should be felo de se.

And the express words of the Judges reported in these Books, shew their Opinion, that the Corporation could not be surrendred.

Jones, 168. Dodderidge Justice, there saith, that the Dean and Chapter cannot surrender their Corporation.

Palm. 501. Whitlock Inst. there saith, For that that the Dean and Chapter are Counsel to the Bishop instituted to that purpose, they cannot dissolve themselves, for the Politick Corporation is the Soul to the Body, that cannot be granted or sever'd; though the King can create a Corporation, he cannot dissolve it. And Jones Inst. there 502. saith, That the Dean and Chapter were Counsel to the Bishop, and cannot destroy themselves; if they could, great Inconvenience thereby will ensue to the Church.

FINIS.